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# CASES

DETERMINED BY THE

# KING'S BENCH DIVISION

OF THE

# HIGH COURT OF JUSTICE

AND BY THE

# COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

# COURT OF CRIMINAL APPEAL

AND BY THE

# RAILWAY AND CANAL COMMISSION.

## ATTORNEY-GENERAL *v.* DE TRAFFORD.

C. A.
1933
July 3, 4, 5, 6, 24.

*Revenue—Succession Duty—Disentailing Assurance by Tenant in tail and Resettlement—Subsequent Death of Tenant for Life—Alienation—Rate of Duty—No new Succession created—Succession derived from Tenant for Life as Predecessor—Succession Duty Act,* 1853 (16 *&* 17 *Vict. c.* 51), *ss.* 2, 15.

A tenant in tail in remainder of settled estates barred the entail and by a resettlement dated May 8, 1914, granted the settled estates (subject to his father's life estate) to the use that trustees should raise a sum of 160,000*l.* as portion for the younger children of the tenant for life and their issue as the tenant for life should appoint with remainders over. By various appointments the tenant for life appointed the sum of 160,000*l.* between his two younger sons and the issue of one of them. The tenant for life died in 1929 and the question arose whether succession duty was payable on his death in respect of this sum at the rate of 5 per cent. as on a succession from the tenant in tail or at the rate of 1 per cent. as on a succession from the tenant for life.

Finlay J., contrary to his own view, followed *Attorney-General* v. *Assheton-Smith* [1924] 2 K. B. 25 in treating *Attorney-General* v. *Cecil*

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ATTORNEY-GENERAL
*v.*
DE TRAFFORD

(1870) L. R. 5 Ex. 263 as a binding authority and therefore decided that duty was payable at the higher rate :—

*Held*, by the Court of Appeal (reversing Finlay J.'s decision), that the tenant in tail's succession had to the extent of this sum of 160,000*l.* become vested during the lifetime of the tenant for life by "alienation" within s. 15 of the Succession Duty Act, 1853 ; and that succession duty was therefore payable by virtue of that section at the same rate as if there had been no alienation, with the result that duty was payable at the rate of 1 per cent. only as on a succession from the tenant for life.

*Attorney-General* v. *Cecil* (1870) L. R. 5 Ex. 263 not followed. *Attorney-General* v. *Assheton-Smith* [1924] 2 K. B. 25 overruled. *Lord Lilford* v. *Attorney-General* (1867) L. R. 2 H. L. 63 and *Lord Wolverton* v. *Attorney-General* [1898] A. C. 535 applied.

APPEAL from a decision of Finlay J. on an information by the Attorney-General.

By his will dated May 5, 1883, Sir Humphrey de Trafford after appointing trustees for the purposes of the Settled Land Act, 1882, devised his residuary estate to the use of his son Humphrey Francis de Trafford (hereinafter called the deceased) for life with remainder to the use of the deceased's first and other sons successively in tail male and he gave the deceased power to charge the same with portions not exceeding (in the event which happened) 90,000*l.* for the benefit of his younger children and to appoint a term of years for securing the same ; and the testator settled his residuary leasehold estates upon trusts corresponding with the limitations of his residuary real estate. He died on May 4, 1881, and his will was proved on July 28, 1886.

By a resettlement dated July 30, 1886 (which was executed in order to comply with a condition contained in the testator's will), the deceased granted and assigned certain estates known as the Barton Estates and investments held therewith upon the like uses as those contained in the testator's will with respect to his residuary real estate or upon trusts corresponding therewith. The said residuary real estate and leaseholds and the Barton Estates and the capital moneys, policies of insurance and other property for the time being subject to the uses or trusts of the said will and resettlement are hereinafter referred to as the settled estate.

The deceased had four children, namely, his eldest son, Humphrey Edmund de Trafford (hereinafter called the present baronet), who was born on December 1, 1891, and three younger children, Rudolph Edgar Francis de Trafford, Raymund Vincent de Trafford and a daughter, all of whom were still living.

In pursuance of a provisional agreement made on April 16, 1904, between the deceased and the then trustees of the testator's will (who and the trustees for the time being of the said will are hereinafter called the trustees) and of a private Act of Parliament confirming the provisional agreements (namely the De Trafford Estate Act, 1904) the trustees in or about the year 1904 purchased the life estate of the deceased in the settled estate for the sum of 46,156*l.* subject to certain paramount charges on the settled estate and to divers charges created by the deceased on his life estate. By s. 22 of the Act of 1904 it was provided that the trustees should apply the net annual income of the settled estate to be received by them during the lifetime of the deceased in making a number of payments including the appropriation of so much of the annual income (not exceeding 6000*l.*) as should in the opinion of the trustees be adequate for the benefit of the deceased and his wife and children and the payment to or for the benefit of the present baronet (on his attaining the age of 21 years) of a sum not exceeding 1000*l.* until his marriage and not exceeding 2000*l.* after his marriage and should accumulate the surplus in manner therein specified.

By a disentailing assurance dated August 22, 1913, the present baronet granted the settled estates (subject to the portions charge of 90,000*l.* made by the deceased in 1907 under the power in the testator's will and to the life interest of the deceased) to the use that a certain sum of 60,000*l.* should be raised and applied as therein mentioned and subject thereto to his own use in fee simple and absolutely.

By a resettlement dated May 8, 1914 (confirmed by a private Act, the De Trafford Estate Act, 1914), the present baronet granted the settled estate, subject to the said portions charge of 90,000*l.* and to the deceased's life interest, to the trustees to the use that they should by mortgage or sale of the settled estate or a sufficient part thereof raise (in the events which happened) a further sum of 160,000*l.* as portions for the younger children of the deceased and their issue in such shares and for such interests as the deceased should appoint and subject thereto to the use of the present baronet for life with remainders over.

By appointments dated December 18, 1923, November 1, 1924, and February 7, 1925, respectively, the deceased irrevocably appointed the said sum of 160,000*l.* as to 75,000*l.* to Rudolph Edgar de Trafford absolutely, as to 25,000*l.* to Raymund Vincent de Trafford absolutely and as to 60,000*l.* on trusts for the benefit of Raymund Vincent de Trafford and his issue.

By a deed of surrender dated August 15, 1928, and made pursuant to an order of the High Court of Justice dated July 28, 1928, the trustees surrendered investments or cash forming part of the settled estate to the value of 300,000*l.* discharged from all trusts relating thereto during the lifetime of the deceased to be applied in satisfaction (inter alia) of the said sum of 160,000*l.*

The deceased died on January 10, 1929. In the circumstances the Attorney-General submitted that succession duty became payable on the death of the deceased (inter alia) under s. 2 of the Succession Duty Act, 1853, and s. 58, sub-s. 1, of the Finance (1909-10) Act, 1910, at the rate of 5 per cent. in respect of the above-mentioned sum of 160,000*l.* as on a succession thereto derived by the brothers of the present baronet or their respective descendants from the present baronet as predecessor.

The defendants as the present trustees of the will of Sir Humphrey de Trafford and of the resettlement dated July 30, 1886, had accepted liability to account for the succession duty, but they contended that succession duty in respect of the said sum of 160,000*l.* was payable at the rate of 1 per cent. and no more as on a succession derived from the deceased as predecessor.

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The information asked for a declaration that succession duty was payable at the rate of 5 per cent. and an order for the defendants to deliver an account of the said succession duty and to pay the amount thereof with interest from the death of the deceased.

Finlay J. said that the question appeared to depend mainly upon the latter part of s. 15 of the Succession Duty Act, 1853 (1), and the point was whether there had been a vesting by alienation or by any title not conferring a new succession in any other person. It had been definitely settled that in s. 15 the words "not conferring a new succession" applied only to "any title" and not to "alienation." Mr. Stamp stated that up to 1924 the view of the authorities would have been that there was an alienation but that they felt constrained by a decision in that year to hold that there was no alienation. His Lordship then referred to *Attorney-General* v. *Cecil* (2), which was decided after the decision of the House of Lords in *Lord Lilford* v. *Attorney-General* (3), and to *Lord Wolverton* v. *Attorney-General* (4) and *Duke of Northumberland* v. *Attorney-General* (5), and said that his own view would have been that the decision in *Attorney-General* v. *Cecil* (2) could not stand with the decisions of the House of Lords in *Lord Wolverton* v. *Attorney-General* (4) and *Duke of Northumberland* v. *Attorney-General* (5); but as Rowlatt J. in *Attorney-General* v. *Assheton-Smith* (6) held that *Attorney-General* v. *Cecil* (2) was still a binding authority, he felt it his duty to follow Rowlatt J.'s decision and to decide the case in favour of the Crown.

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(1) Succession Duty Act, 1853, s. 15: " . . . . Where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

(2) L. R. 5 Ex. 263.
(3) L. R. 2 H. L. 63.
(4) [1898] A. C. 535.
(5) [1905] A. C. 406.
(6) [1924] 2 K. B. 25.

The trustees appealed. The appeal was heard on July 3. 4, 5 and 6 and judgment delivered on July 24, 1933.

*H. S. Preston K.C.*, *A. M. Latter K.C.*, and *L. W. Byrne* for the appellants. Having regard to s. 15 of the Succession Duty Act, 1853, succession duty is only payable at the rate of 1 per cent. as on a succession derived from the deceased as predecessor. By disentailing and settling the sum of 160,000*l.* as portions for the younger children of the deceased, the present baronet did not confer a new succession but the old succession became "vested by alienation or by any title not conferring a new succession" in the younger children.

The other material sections of the Act are s. 1, which defines a succession as denoting any property chargeable with duty under the Act, s. 2, which defines the dispositions and devolutions of property which shall be "deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'"; and s. 14, which deals with the duty on successions transmitted before the successor has become entitled in possession. Finlay J. has felt bound to follow Rowlatt J.'s decision in *Attorney-General* v. *Assheton-Smith* (1) that *Attorney-General* v. *Cecil* (2) is still a binding authority. It is contended, however, that *Attorney-General* v. *Cecil* (2) was wrongly decided having regard to what was said by the House of Lords in later authorities and to *Lord Lilford* v. *Attorney-General.* (3) In the latter case it was decided that a tenant in tail who disentailed did not thereby destroy the estate he possessed but by the exercise of a power which that estate gave him rendered it perpetual. This case seems to have been lost sight of in *Attorney-General* v. *Cecil* (2), where the decision adverse to the appellants in that case is based on the view that as a result of the tenant in tail disentailing and resettling, the estate which previously existed in him

(1) [1924] 2 K. B. 25.
(2) L. R. 5 Ex. 263.
(3) L. R. 2 H. L. 63.

had been destroyed and a new and different estate created; see *Lord Wolverton* v. *Attorney-General* (1), where Lord Herschell distinguishes (2) the case there under consideration from *Attorney-General* v. *Cecil* (3) on the sole ground that the disentailing deed had created a new succession. That distinction cannot properly be made in view of the decision in *Lord Lilford* v. *Attorney-General.* (4) It is true that in *Charlton* v. *Attorney-General* (5) Lord Cairns refers at the end of his judgment to the decision in *Attorney-General* v. *Cecil* (3) "the grounds of which seem to me to be satisfactory", but he gives no explanation of how he arrived at this view and the case under consideration was really a very different one.

Therefore, notwithstanding the strong appearance of confirmation given to it by Lord Cairns's observation, it is contended that the decision was wrong and failed entirely to take into account the previous decision that a tenant in tail who disentails does not destroy his old estate but merely enlarges it. But if the Court takes the view that it is impossible to overrule *Attorney-General* v. *Cecil* (3) then it is contended that the case is distinguishable on the ground that there the original successor, the tenant in tail, died before the original tenant for life. It is true that in *Attorney-General* v. *Assheton-Smith* (6) Rowlatt J. refused to accept this as a relevant consideration, but it is to be noted that in the *Wolverton* case (7) Lord Herschell sought to support the decision in *Attorney-General* v. *Cecil* (3), because if the entire interest of the tenant in tail under that settlement had been conveyed to Lord Eustace Cecil he would have taken nothing at all in the event which happened, inasmuch as the tenant in tail died without issue in the lifetime of the tenant for life. If that be the true ground for the decision, the present case is distinguishable; and in support of this view it is to be observed that the *Charlton* case (5), where Lord Cairns approved *Attorney-General* v. *Cecil* (3) and held it to be applicable, was also a

(1) [1898] A. C. 535.

(2) Ibid. 556.

(3) L. R. 5 Ex. 263.

(4) L. R. 2 H. L. 63.

(5) (1879) 4 App. Cas. 427, 440.

(6) [1924] 2 K. B. 25, 34.

(7) [1898] A. C. 535, 556.

case where the tenant in tail predeceased the tenant for life. The Court is asked to accept this ground of distinction and to overrule *Attorney-General* v. *Assheton-Smith* (1), where Rowlatt J. applied *Attorney-General* v. *Cecil* (2) to a case where the tenant in tail had survived the tenant for life.

[LORD HANWORTH M.R. It seems impossible to distinguish *Attorney-General* v. *Cecil* (2) on this ground.]

In *Attorney-General* v. *Duke of Northumberland* (3) Romer L.J. seeks to explain *Attorney-General* v. *Cecil* (2) on the ground that Lord Eustace Cecil took an interest under the resettlement which he could not be said to be entitled to as alienee of the tenant in tail; but the only real distinction between *Attorney-General* v. *Cecil* (2) and the *Wolverton* case (4) is that in the former case there was a disentailing deed and Romer L.J. in the same judgment (5) recognizes that the effect of such a deed was not to destroy the old estate and create a new estate: see also per Lord Macnaghten on appeal, *Duke of Northumberland* v. *Attorney-General.* (6) The really vital distinction between the present case and *Attorney-General* v. *Cecil* (2) is that in the present case the tenant in tail survived the tenant for life and the Court ought on this ground to allow the present appeal. There has been a clear alienation by the present baronet of his succession.

*Sir Thomas Inskip A.-G.* and *J. H. Stamp* for the Crown. The Crown's main concern in this case is to get a definite decision whether *Attorney-General* v. *Cecil* (2) is good law or must be regarded as displaced by the decisions in the *Wolverton Case* (4) and in *Duke of Northumberland* v. *Attorney-General.* (7) In *Lord Lilford* v. *Attorney-General* (8) the House of Lords decided that a tenant in tail who disentailed only enlarged his estate and therefore enlarged the succession and did not substitute a new one for it. That case was not cited in *Attorney-General* v. *Cecil.* (2) For the purpose of succession duty the value of the succession is the same, but with the difference that

(1) [1924] 2 K. B. 25, 34.
(2) L. R. 5 Ex. 263.
(3) [1904] 1 K. B. 762, 780.
(4) [1898] A. C. 535, 556.
(5) [1904] 1 K. B.
(6) [1905] A. C. 406, 410.
(7) [1905] A. C. 406.
(8) L. R. 2 H. L. 63.

instalments of duty not paid at the death of a tenant in tail only continued payable when he had disentailed: see s. 21 of the Succession Duty Act, 1853. That really disposes of any suggestion that by executing a disentailing assurance the successor can destroy his succession. Further, *Duke of Northumberland* v. *Attorney-General* (1) expressly decides that a sale by a tenant in tail who has disentailed is an alienation within s. 15 of the Act; and the *Wolverton* case (2) decides that where a remainderman has created charges on his reversion that is an alienation within s. 15. Again, s. 2 of the Act defines the conditions in which a succession is created and one of the fundamental principles of the Act is that when once a succession has come into existence there is no possibility of escaping duty unless the property ceases to exist. It is necessary, too, to bear in mind when considering *Attorney-General* v. *Cecil* (3) that in *Lord Braybrooke* v. *Attorney-General* (4) it had been decided that where an interest was created by the exercise of a joint power, the succession was derived from the person out of whose estate the interest was carved, and further that an appointment in remainder did not create a new succession.

It remains to deal with *Attorney-General* v. *Cecil* (3) in the light of these considerations. Kelly C.B. decided the case on the view that there was a new succession and that, this being so, there could not be an alienation; but the view that there was a new succession is contrary to the cases already cited and there is just as much an alienation in this case as in the *Duke of Northumberland's* case. (1) This decision is directly contrary to the ratio decidendi of the *Duke of Northumberland's* case (1) and to dicta in *Lord Braybrooke* v. *Attorney-General.* (4) Then Martin B. decided the case on a ground directly contrary to *Wolverton's* case (2) and Channell B. and Cleasby B. adopted the same view as that expressed by Kelly C.B. The reasoning therefore on which the decision in *Attorney-General* v. *Cecil* (3) rests is inconsistent with the

(1) [1905] A. C. 406.
(2) [1898] A. C. 535.
(3) L. R. 5 Ex. 263.
(4) (1860–1) 9 H. L. C. 150.

*Wolverton* case (1) and the *Duke of Northumberland's* case. (2)

It is submitted that the observation of Lord Cairns in the *Charlton* case (3) approving *Attorney-General* v. *Cecil* (4) is an unauthoritative dictum contradicted by authoritative decisions of the House of Lords. If, then, the decision in *Attorney-General* v. *Cecil* (4) is to be supported, it must be on grounds not stated in any of the judgments. It has been suggested as a ground that the tenant in tail died in the lifetime of the tenant for life. But that is a matter which can make no possible difference. The only other ground suggested was that in *Cecil's* case (4) there was no alienation, but in the *Wolverton* case (1) Lord Macnaghten said (5) there was no foundation for such a singular notion, and that case was a clear decision to the contrary.

*H. S. Preston K.C.* replied.

*Cur. adv. vult.*

1933. July 24. LORD HANWORTH M.R. read the judgment of the Court (LORD HANWORTH M.R., LAWRENCE and SLESSER L.JJ.). The point in this case in which we desired to reserve our judgment is whether succession duty became payable upon the death of the late Sir Humphrey Francis de Trafford (hereinafter called " the deceased ") under s. 2 of the Succession Duty Act, 1853, and s. 58, sub-s. 1, of the Finance (1909–10) Act, 1910, at the rate of 5 per cent. in respect of the portions charge of 160,000*l.* in the Information mentioned, as on a succession thereto derived by the brothers of the present Baronet or their respective descendants from the present Baronet as predecessor.

The facts relevant to this question may be stated quite shortly. By his will dated May 5, 1883, Sir Humphrey de Trafford, Baronet (the father of the deceased), who died on May 4, 1886, devised his residuary real estate to the use of the deceased for life with remainder to the use of the deceased's first and other sons successively in tail male and settled his

(1) [1898] A. C. 535.
(2) [1905] A. C. 406.
(3) 4 App. Cas. 427, 440.
(4) L. R. 5 Ex. 263.
(5) [1898] A. C. 563.

leasehold estates upon trust corresponding with the limitations of his residuary real estate. The deceased had four children namely his eldest son Humphrey Edmund de Trafford (hereinafter called "the present Baronet") who was born on December 1, 1891, and three younger children, two sons and a daughter. By a disentailing assurance dated August 22, 1913, the present baronet granted the settled estates (subject to the life interest of the deceased) to the use that a certain sum of 60,000*l.* should be raised and applied as therein mentioned for the benefit of the deceased and his wife and subject thereto to his own use in fee simple and absolutely. By an indenture of resettlement dated May 8, 1914, and set out in the Schedule to and confirmed by a private Act of Parliament, namely the De Trafford Estate Act, 1914, the present baronet granted the settled estate (subject to the life interest of the deceased) to the trustees to the use that the trustees should by mortgage or sale of the settled estate or of a sufficient part thereof raise (in the events which happened) a sum of 160,000*l.* as portions for the younger children of the deceased (that is to say the brothers and sister of the present baronet) and their issue in such shares and for such interests as the deceased should appoint and, subject thereto, to the use of the present baronet for life with remainders over. On December 18, 1923, the deceased irrevocably appointed the sum of 75,000*l.* being part of the above mentioned sum of 160,000*l.* to his son Rudolph Edgar Francis de Trafford, a brother of the present baronet, absolutely. On November 1, 1924, the deceased irrevocably appointed the sum of 25,000*l.* (being a further part of the said sum of 160,000*l.*) to Raymund Vincent de Trafford absolutely—another brother of the present baronet. On February 7, 1925, the deceased irrevocably appointed the sum of 60,000*l.* (being the balance of the said sum of 160,000*l.*) on certain trusts for the benefit of the said Raymund Vincent de Trafford and his issue. By a deed of surrender dated August 15, 1928, and made pursuant to an order of the High Court of Justice dated July 28, 1928, the trustees surrendered investments or cash forming part of the settled estate to the value of 300,000*l.* discharged from all trusts relating thereto, during the lifetime of the deceased, to be applied in satisfaction of (inter alia) the said portions charge of 160,000*l.* The trustees, at some time after August 15, 1928, distributed or retained the said sum of 300,000*l.* accordingly. The deceased died on January 10, 1929, being a date less than three years after the date of the said surrender dated August 15, 1928. Upon such death the present Baronet became tenant for life of the settled estate.

FINLAY J. decided in favour of the Crown that succession duty on the portions charge of 160,000*l.* at the rate of 5 per cent. as on a succession derived from the present baronet as predecessor was payable, and not only, as contended for by the appellants at the rate of 1 per cent. as on a succession derived from the deceased as predecessor. The learned Judge followed the decision of Rowlatt J. in *Attorney-General* v. *Assheton-Smith* (1) which in turn was decided upon, and followed, *Attorney-General* v. *Cecil.* (2) He expressed a desire that the case should be taken to the Court of Appeal, for there are three decisions which it is not easy to reconcile with *Attorney-General* v. *Cecil* (2); namely *Lord Lilford* v. *Attorney-General* (3); *Lord Wolverton* v. *Attorney-General* (4) and *Duke of Northumberland* v. *Attorney-General.* (5)

The question turns upon the latter part of s. 15 of the Succession Duty Act, 1853. The lower rate would be applicable unless those who are successors—in this case the two brothers—take by a title which confers a new succession upon them.

The difficulties arise, and they are formidable, from the previous decisions as to what is a new succession; and in this Court it seems that a choice must be made whether *Attorney-General* v. *Cecil* (2) is to be followed, and consequently the case of *Attorney-General* v. *Assheton-Smith* (1) which was based upon it, is to be supported; or whether the decision of the House of Lords in *Lord Wolverton* v. *Attorney-General* (4) is

(1) [1924] 2 K. B. 25.
(2) L. R. 5 Ex. 263.
(3) L. R. 2 H. L. 63.
(4) [1898] A. C. 535.
(5) [1905] A. C. 406.

the guide that should now be treated as binding upon this Court. There is no doubt that *Attorney-General* v. *Cecil* (1) has the powerful declaration of Lord Cairns that it was rightly decided, to support it: see *Charlton* v. *Attorney-General* (2); but the case cannot be regarded as unquestioned. The case of *Lord Lilford* v. *Attorney-General* (3) was mentioned in the argument, but is not referred to in the judgments. It should be borne in mind that the argument of the Attorney-General in the *Cecil* case (1) included as his second proposition that where the new estate, or interest, is called into existence by the exercise of a joint power, created by the new settlement, in the tenant for life and tenant in tail, the power ought to be considered as deriving its force and efficacy from the interest of the tenant in tail,—that is as a new estate. That argument prevailed. Kelly C.B. said (4): "In March, 1855," Lord Cranborne the tenant in tail "joined in resettling the property by a deed the operation of which was to extinguish and destroy that estate which existed in him at that date, and to substitute a new and different estate. The estate tail which existed in him previously then ceased to exist, and out of the interest he acquired under that deed a new estate tail in remainder was created in him, subject to powers and qualifications which rendered it a wholly different estate from that which he had before enjoyed." Martin B. took the same view. (5) He held that the decisions to which he refers, established that when a tenant for life and tenant in tail in remainder concur in barring the entail, and creating an interest to take effect on the death of the tenant for life, "that interest is derived entirely from the interest of the tenant in tail, and not at all from the tenant in life, whose estate is in no way affected." It must be noted not only that there are passages in the judgments of both Martin B. (6) and of Cleasby B. (7) which are not easy to reconcile with the decision of the House of Lords in *Lord*

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(1) L. R. 5 Ex. 263.
(2) 4 App. Cas. 427, 440.
(3) L. R. 2 H. L. 63.
(4) L. R. 5 Ex. 270.
(5) Ibid. 271.
(6) Ibid. 272.
(7) Ibid. 274.

*Wolverton* v. *Attorney-General* (1), but also that the important decision of *Lord Lilford* v. *Attorney-General* (2), which was given in March, 1867, was not called to the attention of the Court of Exchequer at all. That decision was of the House of Lords, and laid down that a disentailing deed executed by a tenant in tail does not destroy the interest he possesses in the estate and of which he is the successor, but enables him, by the exercise of the power which that interest gives him, to render it perpetual—see per Lord Chelmsford. (3) With this statement of the law in the House of Lords it seems difficult to accept the view of the Court of Exchequer referred to above, that the tenant in tail, by joining in a deed of resettlement of the property, destroyed the estate which existed in him at that date, and substituted a new and different estate.

I now come to the case of *Lord Wolverton* v. *Attorney-General*. (1) It is unnecessary to recall the facts. Lord Halsbury puts the case in this way (4) that " the utmost that can be said is that upon the occurrence of the death of Lady Wolverton the present Lord Wolverton's donors obtained the power to render effectual a gift which they had inter vivos agreed to give him before the death took place. ' Succession ' in the Act means not the act of succeeding but property chargeable with duty under the Act . . . . I am not, of course, suggesting that the transfer inter vivos of property the right to which arises upon the death can escape the duty by its being transferred to a person other than the original successor. The succession once created the duty must be paid for it ; but I can find no warrant in the statute for a new succession duty being leviable upon the same property or money where no new death has created the right to such succession." Lord Herschell is explicit to the same effect (5) : " I can see nothing either in the terms of the section or in the reason of the thing to suggest that an alienation by instrument inter vivos, which merely transferred the interest of the successor or some part of it to some other person, would create a new succession.

(1) [1898] A. C. 535.
(2) L. R. 2 H. L. 63.
(3) L. R. 2 H. L. 70.
(4) [1898] A. C. 543, 544.
(5) Ibid. 555.

In such a case the same property passes into possession on the same death, and though by a transaction inter vivos another person is substituted for the original successor, I do not think it can reasonably be said that 'a new succession' was thereby conferred." Lord Macnaghten says (1): "a mere alienation—a mere transfer of a subsisting succession—cannot confer a new succession. But a new succession may, of course, be conferred by a title in which alienation is followed by a transmission of interest before the succession vests in possession"; and he then proceeds to state that the transaction then under consideration fell precisely within the terms of s. 15. The conclusion was that where the reversioners had created a charge upon their contingent reversionary interests in the estate, there was an alienation of a part of the succession created by the testator's will, and not a new succession.

It is impossible to overlook this decision, or to set aside the implication which the words that I have quoted bring to the present case of the portions charge of 160,000*l.* created by the resettlement of May 8, 1914. In this Court we must follow the direction that they give. I am aware that this means that we do not accept the authority of *Attorney-General* v. *Cecil* (2), but for the reasons I have given that decision is not in my judgment satisfactory. It is inconsistent with the cases of *Lord Lilford* v. *Attorney-General* (3) and of *Duke of Northumberland* v. *Attorney-General* (4), and in my opinion must not any longer be accepted as a guide. The attempted explanation that the decision of the Court of Exchequer was reached because the tenant in tail died before the tenant for life does not appear to be justified in view of the reasoning from which excerpts have been given, and which are independent of any such fact as the earlier death of the tenant in tail. On this point also see the observations of Rowlatt J. in *Attorney-General* v. *Assheton-Smith* (5), where he rejects this suggested explanation of *Attorney-General* v. *Cecil.* (2)

(1) [1898] A. C. 561.
(2) L. R. 5 Ex. 263.
(3) L. R. 2 H. L. 63.
(4) [1905] A. C. 406.
(5) [1924] 2 K. B. 25.

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This present decision overrules the conclusion which Rowlatt J. felt bound to reach in *Assheton-Smith's* case (1), but takes note of *Lord Lilford's* case (2) in the House of Lords, to which respect must be given. *Lord Lilford's* case (2) was expressly approved by Romer L.J. in the *Duke of Northumberland's* case (3), and also by the House of Lords in the same case (4), see per Lord Macnaghten. (5) The appeal must be allowed on this point, but, in view of the suggestion made by the learned Judge as to an appeal, and the attitude adopted by the Crown in accepting and elaborating Mr. Preston's argument in support of the appeal on this point—without costs on either side.

*Appeal allowed.*

Solicitors : *Whitfield, Byrne & Dean, for Taylor, Kirkman & Mainprice, Manchester* ; *Solicitor of Inland Revenue.*

(1) [1924] 2 K. B. 25.
(2) L. R. 2 H. L. 63.
(3) [1904] 1 K. B. 762, 779.
(4) [1905] A. C. 406.
(5) Ibid. 410.

H. C. G.

# ANDREWS BROTHERS (BOURNEMOUTH), LIMITED v. SINGER AND COMPANY, LIMITED.

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1933
*Oct. 4.*

[1932. A. 1302.]

*Sale of goods—Contract for sale of "new Singer car"—Delivery of car not a "new Singer car"—Exclusion by terms of contract of "all conditions, warranties and liabilities implied by statute, common law or otherwise."*

By a written agreement the defendants appointed the plaintiffs sole dealers within a named area for the sale of "new Singer cars," and the plaintiffs agreed to purchase from the defendants a certain number of those cars. Clause 5 of the agreement was in these terms: "All cars sold by the company [the defendants] are subject to the terms of the warranty set out in Schedule No. 3 of this agreement, and all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded." By the warranty contained in Schedule No. 3, which was expressed to be limited to new vehicles manufactured by the defendants and to be "in lieu of any warranty (or condition) implied by common law, statute, or otherwise," the sole obligation of the defendants was to repair or replace within twelve months of the delivery of the vehicle any fault disclosed where this was due to defective material or workmanship.

The plaintiffs gave an order to the defendants for a new Singer car and a car was delivered to and accepted by the plaintiffs which by reason of it having already run a considerable mileage was not a new car within the meaning of the contract. On a claim by the plaintiffs for breach of contract in supplying a car which was not a new car, the defendants relied upon Clause 5 of the agreement as exempting them from liability.

*Held*, that the term "new Singer car" was an express and not an implied term of the contract, and that as a "new Singer car" had not been delivered the defendents were liable for breach of contract and could not claim exemption from liability by the terms of Clause 5.

Decision of Goddard J., affirmed.

APPEAL from a decision of Goddard J.

The plaintiffs sued the defendants, claiming damages for breach of contract in respect of the sale of a motor-car.

By what was described as a "Main Dealers' Agreement," dated August 1, 1931, the defendants appointed the plaintiffs their sole dealers within a named area "for the sale of new Singer cars," and the plaintiffs agreed to purchase from the defendants a certain number of those cars. Clause 5 of the agreement was in these terms :—"All cars sold by the company [the defendants] are subject to the terms of the warranty set

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out in Schedule No. 3 of this agreement, and all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded."

The warranty set out in Schedule No. 3 was as follows :— "We warrant that in the manufacture of new vehicles we have taken all precautions which are usual and reasonable to secure excellence of material and workmanship, and we undertake that if any defect is disclosed in any part of a new vehicle within twelve months of the date of delivery of such vehicle we will (provided such defective part is returned to our works, carriage paid) examine the part alleged to be defective, and if, on such examination, the fault is due to defective materials or workmanship, for which we are responsible, we will repair or replace the defective part free of charge. The foregoing warranty is limited to new vehicles manufactured by us, and is in lieu of any warranty (or condition) implied by common law, statute or otherwise, as to the quality or fitness for their purpose of any goods manufactured, replaced or repaired by us, every such implied warranty (or condition) being in all cases excluded, and our liability under the terms of this warranty is strictly limited to the replacement or repair and despatch to the sender, carriage forward, of the part replaced or repaired. . ."

In pursuance of the agreement the plaintiffs sent an order to the defendants, for one 18 h.p. 6-cylinder Singer saloon car, and the defendants agreed to deliver it on March 9, 1932. The plaintiffs alleged that it was an express term and/or an implied term that the car should be a new car of the defendants' manufacture. Delivery of the car was taken at the defendants' works at Birmingham by the plaintiffs' managing director, who noticed that the speedometer bore the reading 550 odd miles, and who found in the pocket of the car a parking ticket issued at Leicester, and from these he knew, as the judge found, that the car had run a considerable distance. The plaintiffs' representative at the time asked no questions regarding this, and the car was delivered to the plaintiffs at Bournemouth.

It appeared from the evidence at the trial that before its purchase by the plaintiffs the car had been sent to Darlington to be shown to a prospective customer, but, as he did not buy it, it was driven back to Birmingham, where it was adjusted, and was, at the time of the sale to the plaintiffs, as the judge found, in good mechanical condition.

The plaintiffs alleged that by reason of what had taken place the car was not a new car; that they had lost the profit on resale of a new car, and had been put to expense in and about taking delivery and examination of the car; and in respect of this they claimed damages.

The defendants pleaded that the plaintiffs' representative in the exercise of his own skill and judgment took delivery and paid for the car as a new car. They denied that they were guilty of any breach of agreement, and, further, they pleaded that if the car was in fact depreciated or was defective in any way (which they denied) their liability was limited to the repair or replacement of defective parts, and as these had not been returned they were under no liability to the plaintiffs.

Goddard J. held that the car was not a new car when sold to the plaintiffs; that the defendants' obligation was to sell and deliver a new car; and that as a new car had not been delivered the plaintiffs were entitled to damages, which he assessed at 50*l*., and in addition he gave them certain expenses to which they had been put.

The defendants appealed.

*Pritt K.C.* and *R. A. Willes* for the appellants. We do not contest the finding arrived at by Goddard J. on the evidence before him that the car supplied to the respondents was not a new car within the meaning of the contract, but we say that the respondents having taken delivery of the car are precluded from claiming damages by reason of clause 5 of the agreement—a clause going beyond that which was relied upon in *Wallis, Son & Wells* v. *Pratt & Haynes* (1) where the relevant clause was in these terms: " Sellers give no warranty, express or

(1) [1910] 2 K.B. 1003; [1911] A. C. 394.

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implied as to growth, description, or any other matters." It will be observed that the word "condition" was not included, and it was pointed out in the House of Lords that a plain distinction is drawn in the Sale of Goods Act, 1893, between a "condition" and a "warranty." The same was pointed out in *Baldry* v. *Marshall* (1). In this exemption clause the term "condition" is included. By the contract there is a description of the car sold as a new car, and from that under s. 13 of the Sale of Goods Act, there would be an implied condition that the car should correspond with the description were it not for clause 5 which in terms excludes "all conditions, warranties and liabilities implied by statute, common law or otherwise." The respondents accepted the car and thus waived the only right they had, namely, the right to reject it. [They also cited *Bridge* v. *Wain* (2) and *Barr* v. *Gibson* (3)].

*Monckton K.C.* and *Maitland Walker* for the respondents were not called upon.

SCRUTTON L.J. This is an appeal from a judgment of Goddard J. in an action by the plaintiffs, a company carrying on business at Bournemouth, who in the agreement between them and the defendants out of which the dispute has arisen are called agents for manufacturers, which is quite a misleading term inasmuch as they are really purchasers of motor cars which they intend to sell. They brought their action against Singer & Co. alleging that the latter delivered a car which did not comply with the terms of the contract.

The facts which are fully set out in the careful judgment of Goddard J. may be shortly summarised: the description of the kind of car the plaintiffs wanted could have been satisfied by delivery to them of a new car; but the particular car which Singer & Co. tendered to them was in this position. Another agent, who thought he had in view a purchaser for the car, had it sent to Darlington and thence it was driven some distance further to show to the prospective customer, but as that person did not like it the agent returned it to Singer & Co.,

(1) [1925] 1 K. B. 260.
(2) (1816) 1 Starkie, 504.
(3) (1838) 3 M. & W. 390.

the result being that it had run a very considerable mileage with the consequence no doubt that certain changes had taken place in it. When the car was tendered to the plaintiffs' representative he noticed or suspected that it had run a considerable distance, but he took it, doing nothing, however, so far as I can see, to abandon any claim for damages on the ground that it was not a new car.

At the trial two points arose: First, the plaintiffs said that the car was not a new car as that term was understood in the trade. The defendants on the other hand said it was. Goddard J. came to the conclusion that it was not a new car, and in this Court his decision on that point has not been questioned and I therefore proceed on the assumption that the defendants, who were bound to supply a new car, tendered a car which was not a new one. The defendants contended secondly that they are exempted from liability by reason of clause 5 of the agreement entered into. That clause reads as follows: "All cars sold by the company are subject to the terms of the warranty set out in Schedule No. 3 of this agreement and all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded." The defendants say that their obligation to supply a car complying with the description in the contract is a condition implied by statute, and as the plaintiffs accepted the car under the agreement containing clause 5 they cannot bring an action in respect of the supplying of a car which was not a new one. Clause 5 is, I take it, a sequel to *Wallis, Son & Wells* v. *Pratt & Haynes* (1). In that case the subject matter of the sale was "common English sainfoin," and the contract contained this clause: "Sellers give no warranty express or implied as to growth, description or any other matters." What in fact was sold under the contract was not "common English sainfoin" but something quite different, namely, "giant sainfoin." On discovering this the purchasers sued for damages, to which claim the sellers replied that they gave no warranty express or implied as to description. The Court of Appeal (Moulton L.J. dissenting) took the view that the clause excluded any liability even though the seed supplied was not of the description contracted to be supplied. The House of Lords adopted Moulton L.J.'s judgment and said that the goods tendered should comply with the description in the contract, which description was not a warranty but a condition, and as the clause relied on did not include "condition" it did not operate to protect the sellers. Those advising the present defendants in preparing this agreement appear to have thought that by the inclusion of the word "conditions" in the relevant clause liability would be excluded, although what was supplied did not comply with the description. The question therefore is whether the defendants have succeeded in excluding liability in this case—whether they can tender under the contract goods not complying with the description in the contract and say that the plaintiffs having accepted the car cannot now sue for breach of contract.

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(1) [1910] 2 K. B. 1003; [1911] A. C. 394.

In my opinion this was a contract for the sale of a new Singer car. The contract continually uses the phrase "new Singer cars." At the end of the agreement I find this: "In the event of the dealer having purchased from the Company during the period of this agreement 250 new cars of current season's models"; and in the very beginning of the agreement I find this: "The Company hereby appoint the dealer their sole dealer for the sale of new Singer cars." The same phrase also occurs in other parts of the agreement, and the subject-matter is therefore expressly stated to be "new Singer cars." The judge has found, and his view is not now contested, that the car tendered in this case was not a new Singer car. Does then clause 5 prevent the vendors being liable in damages for having tendered and supplied a car which is not within the express terms of the contract? Clause 5 says this: "All conditions, warranties and liabilities implied by statute, common law or otherwise are excluded." There are well-known obligations in various classes of contracts which are not expressly mentioned but are implied. During the argument Greer, L.J. mentioned an apt illustration, namely, where an agent contracts on behalf of A he warrants that he has authority to make the contract on behalf of A although no such warranty is expressed in the contract. Mr. Pritt relied on s. 13 of the Sale of Goods Act, 1893, which provides that "where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description . . . ," and from that he says it follows that this particular condition comes within the words employed by the section. That, I think, is putting a very strained meaning on the word "implied" in the section. Where goods are expressly described in the contract and do not comply with that description, it is quite inaccurate to say that there is an implied term; the term is expressed in the contract. Suppose the contract is for the supply of a car of 1932 manufacture, and a car is supplied which is of 1930 manufacture, there has not been a breach of an implied term; there has been a breach of an express term of the contract. It leads to a very startling result if it can be said that clause 5 allows a vendor to supply to a purchaser an article which does not comply with the express description of the article in the contract, and then, though the purchaser did not know of the matter which prevented the article supplied from complying with the express terms of the contract, to say, "We are under no liability to you because this is a condition implied by statute and we have excluded such liability."

In my view there has been in this case a breach of an express term of the contract. If a vendor desires to protect himself from liability in such a case he must do so by much clearer language than this, which, in my opinion, does not exempt the defendants from liability where they have failed to comply with the express term of the contract. For these reasons I think Goddard J. came to a correct conclusion, and this appeal therefore fails.

GREER L.J. I agree. There are two facts that form more or less firm ground on which the judgment can be based. First, it is not disputed that by the terms used in the contract

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the sale is to be of a new Singer car, and secondly, it was found by the judge, and is not now disputed, that the car delivered and as to which damages are claimed was not a new Singer car. It is said, however, by Singers that inasmuch as the car has been delivered to and accepted by the plaintiffs, and as the time for its rejection has passed, there is a clause in the contract which deprives the buyers of any remedy. It is contended that they are not liable for this breach of contract in delivering an old car instead of a new one, by the express terms of clause 5 of the contract, which says that "all cars sold by the company are subject to the terms of the warranty set out in Schedule No. 3 of this agreement, and all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded." Scrutton L.J. has pointed out that sellers who desire to protect themselves against liability for damages for breach of condition or warranty were probably alarmed by the decision in *Wallis, Son & Wells* v. *Pratt & Haynes* (1), and so the vendors in this case have endeavoured to escape the effect of the decision by phrasing the exempting clause differently. In *Wallis, Son & Wells* v. *Pratt & Haynes* (1) the clause was in these terms: "Sellers give no warranty express or implied as to growth, description, or any other matters, and they shall not be held to guarantee or warrant the fitness for any particular purpose of any grain, seed, flour, cake, or any other article sold by them, or its freedom from injurious quality or from latent defect." In that clause the sellers had not inserted, in addition to the word "warranty" the words "or condition," and inasmuch as compliance with the description in the clause was held not to be a warranty but a condition, the sellers failed to gain the protection they claimed they had from the clause. In one respect that clause was wider than that in the present case because there the sellers protected themselves against any express warranty that there might be in the contract, while those responsible for the wording of the clause in this contract, though they inserted the word "condition" left out the word "express." It seems to be an odd thing to say with respect to the description of an article sold that the vendor's obligation to deliver something which is the article sold and which complies with its description in the contract is an implied condition or warranty. It is quite true that by s.13 of the Sale of Goods Act, 1893, the words "implied condition" are used, the section providing that "where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description . . ." The Sale of Goods Act was intended to be a code for the purpose of removing all difficulties with regard to the interpretation of contracts of sale, as well as to provide for what might be determined to be the legal consequences of such contracts. It may be right to say that the descriptive terms of the contract, though they are express terms, are not expressly made conditions of the contract, and by using the expression "implied condition" in s. 13, those responsible for the statute did not mean to say that the obligation to supply the thing described is not an express obligation; they merely meant to say that the description is not a mere term or a mere warranty but is a condition of the contract by implication of law.

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(1) [1910] 2 K. B. 1003; [1911] A. C. 394.

Looking at this contract it seems quite plain that it is one for the sale of a new Singer car and the phrase "new Singer car" is an express and not an implied term. Not only is that the case with regard to the body of this contract, but when we look at the guarantee which is to take the place of all warranties and liabilities implied by statute or common law which are excluded by clause 5, we find that the guarantee is to apply to any goods delivered under the contract and is a warranty expressly relating to new vehicles. It cannot be applied to a case where there is no new vehicle at all, because by its very terms the guarantee applies only to repairs to be done within twelve months after the delivery of a new Singer car, and if I did not take the view I have expressed with regard to the contract, apart from the guarantee, I should be prepared to say that the guarantee in itself contains a warranty that the goods which are to be delivered, and in respect of which the

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warranty is to apply, are to be new Singer cars. For those reasons I think the judgment of Goddard J. was right, and that this appeal should be dismissed.

Eve J. I am of the same opinion and I need add nothing to what has been said.

*Appeal dismissed.*

Solicitors for appellants: *Sharpe, Pritchard & Co., for Pridmore & Nelson, Coventry.*

Solicitors for respondents: *Barnes & Butler, for J. W. Miller, Poole.*

J. S. H.

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*Oct.* 23.

## POUNDER *v.* LONDON COUNTY COUNCIL.

[1932. P. 1255.]

*Poor Law—Superannuation—Service of Officer with Guardians conferring benefits under Poor Law Officers' Superannuation Act,* 1896*—Transfer to County Council having no Superannuation Scheme—Resignation—Contract of Service with another County Council giving benefits under Asylums Officers' Superannuation Act,* 1909*—Applicability of Act of* 1896 *or* 1909 *—Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17). *ss.* 119, 124, *sub-s.* 1; 134.

The plaintiff, a porter, under the provisions of s. 119 of the Local Government Act, 1929, was transferred to the service of a County Council having no superannuation scheme applicable to him. Sect. 124, sub-s. 1 enacted that in such circumstances the provisions of the Poor Law Officers' Superannuation Act, 1896, should apply to him, and "shall continue so to apply to him so long as he is in the service of the council of any county." He afterwards resigned and then entered into a contract of service with the defendants, another county council, which had a superannuation scheme under the Asylums Officers' Superannuation Act, 1909. The plaintiff claimed to be entitled to the benefits of the latter scheme and to be no longer under the Act of 1896. Talbot J. decided against the plaintiff's claim, and the plaintiff appealed.

*Held*, that the Act of 1896 continued to apply to him, as he was in the service of a county council though by contract only and not as a transferred officer. The words of s. 124, sub-s. 1, "service of the council of any county" covered his service with the defendants as well as that with the council to which he had been transferred.

Decision of Talbot J. [1933] 2 K.B. 85, affirmed.

Appeal from a decision of Talbot J.

The plaintiff was in April, 1928, in the employment of the Dursley Board of Guardians as a porter, and, as such, came within the Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50). Under the provisions of s. 119 of the Local Government Act, 1929, he was transferred to the service of the Gloucestershire County Council on April 1, 1930, in his former capacity of porter. That council had no superannuation scheme applicable to him, and accordingly, under the provisions of s. 124, sub-s. 1, of the Act of 1929 (1), the Act of 1896 still applied to him. On June 8, 1930, he resigned, having applied to the defendants, the London County Council, for employment as a male nurse in the Claybury Asylum. He was duly so appointed on June 9, 1930. The plaintiff left his quarters with the Gloucestershire County Council at twelve o'clock noon on June 9, 1930, and arrived at the asylum and took up his duties about 4 p.m.

The plaintiff asked for a declaration that he was entitled to the benefits of the Asylums Officers' Superannuation Act, 1909 (9 Edw. 7, c. 48), as being applicable to his employment with the defendants, and that he was no longer within the Poor Law Officers' Superannuation Act, 1896. It was not disputed that the benefits under the Act of 1909 were more advantageous for the plaintiff.

No such statutory provisions for the superannuation of persons employed by the councils of all counties and county boroughs as were referred to in the latter part of s. 124, sub-s. 1, of the Act of 1929 had in fact been made.

Talbot J. held, on the construction of s. 124, sub-s. 1, of

(1) The Local Government Act, 1929, s. 124, sub-s. 1: "Where any officer by whom the annual contributions required by the Poor Law Officers' Superannuation Act, 1896 . . . have been made is, by virtue of this Act, transferred to the service of any council, then, if the council to whose service he is transferred have no superannuation scheme or if, in the case of an officer transferred to the service of a council who at the appointed day have such a scheme, he gives, within three months after the appointed day, notice in writing to that council that he elects to remain subject to the provisions of the Act of 1896, that Act shall apply to him . . . and shall continue so to apply to him so long as he is in the service of the council of any county or county borough until, under such statutory provisions as may be made for the superannuation of persons employed by the councils of all counties and county boroughs, there becomes applicable to him a superannuation scheme not less favourable than that provided" by sub-s. 2 (*a*).

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the Act of 1929, that the Act of 1896, which applied to the plaintiff while he was in the service of the Gloucestershire County Council, continued to apply to him so long as he was in the service of any county council, and therefore so long as he was in the service of the London County Council, notwithstanding that he was in their service by contract only and not as a transferred officer.

The plaintiff appealed.

*Hilbery K.C.* and *Sir G. W. H. Jones* for the appellant. The decision of Talbot J. in this case was wrong. The Poor Law Officers' Superannuation Act, 1896, was passed in 1896 to provide for superannuation allowances to poor law officers and servants. In 1909 the Asylums Officers' Superannuation Act, 1909, was passed to provide for superannuation allowances to officers and servants employed in public asylums for the insane in Great Britain and Ireland. Until the Local Government Act, 1929, was passed the position was quite clear. The scheme of that Act (inter alia) was to transfer to the jurisdiction of the councils of counties or county boroughs the duties and functions of the existing poor law authorities and to transfer the officers of poor law authorities to the service of county councils or borough councils. Sect. 124 of the Act of 1929 provided that if the council to whose service an officer was transferred had no superannuation scheme the Act of 1896 should apply to him. The section goes on to provide that the Act of 1896 " shall continue so to apply to him so long as he is in the service of the council of any county or county borough." Talbot J. has put a construction upon that section which deprives the appellant of the benefit of the Act of 1909. But the Act of 1929 was never intended to deprive an officer of the rights given to him by the Act of 1909. Sect. 124 was not intended to apply to the case of a man who had passed out of his service as a poor law officer and had entered as a free man into a service to which the Act of 1909 applied. When the appellant entered into the service of the London County Council, the Act of 1896 had ceased to apply to him, because there was a period of unemployment between his leaving the employment of the Gloucestershire County Council and the commencement of his employment by the London County Council. He was then no longer a transferred officer but a free man and the Act of 1909 automatically applied to him on entering the service of the London County Council. It is true that read literally the latter portion of s. 124 of the Act of 1929, namely, that the Act of 1896 " shall continue so to apply to him so long as he is in the service of the council of any county or county borough," would apply to the appellant ; but the section ought to be read so as to give effect to the intention of the legislature which was that a person who was transferred into the service of any county council should receive the same benefits as he would have done if he had entered into their service in the first instance. In order that the section should apply to a man the service must be continuous service, and when the service of a man ceases the section ceases to apply to him.

[SCRUTTON L.J. There is a change in the language of the section from " the council to whose service he is transferred " to " the service of the council of any county or county borough." That clearly implies a break in the continuity of the service. The difficulty you have to get over is the word " any."]

If the section is read in that way the appellant will be in a worse position than the other male nurses at Claybury Asylum, and he will be subject to the superannuation scheme under the Act of 1896 whenever he is employed by a county or borough council, in whatever capacity and however long a period has elapsed since his employment by the Gloucestershire County Council. Such a construction would lead to an absurd result.

*van den Berg K.C.* and *Lancelot Fletcher* for the respondents were not called upon to argue, but they referred to s. 20 of the Act of 1909.

SCRUTTON L.J. The contest between the two parties to this appeal is as to which scale of superannuation applies to the appellant, who is a male nurse in the employ of the London

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County Council at the Claybury Asylum. The appellant says that the scale which applies is the scale under the Asylums Officers' Superannuation Act, 1909, the London County Council say that the scale applicable is that under the Poor Law Officers' Superannuation Act, 1896.

During the argument, before the judgment of Talbot J. was read, I think I sufficiently indicated the view at which I had arrived, namely, that the result of Talbot J.'s decision was right, and that the appeal must fail. Having read Talbot J.'s decision I so entirely agree with every word of it that I do not propose to repeat it. I take it as my judgment.

The wording of s. 124 of the Local Government Act, 1929, seems to me to be quite clear. The appellant is in the position (without going through the facts) that the first part of sub-s. 1 of s. 124 applies to him, and consequently that the Act of 1896 applies to him ; and then come the relevant words of s. 124, sub-s. 1 of the Local Government Act, 1929, which provide that the Act of 1896 "shall continue so to apply to him so long as he is in the service of the council of any county or county borough." The appellant is in the service of the London County Council, although that is not the service of the same county council as that to which he was transferred by the operation of the Act, as he was transferred to the service of the Gloucestershire County Council. The appellant resigned from that service and has entered into the service of the London County Council. The section appears to me expressly to contemplate that the service of the council of any county, whether the one from which he was transferred or the one which he subsequently entered, makes the Act of 1896 continue to apply. I notice that the Acts of 1896 and 1909 under which the rival scales of superannuation exist both contemplate that service need not be continuous ; that in order to make up a superannuation period two periods which are not continuous may be taken ; and I also notice that neither of the previous Acts says that the officer must "continue in the service in the same capacity in order to obtain a superannuation allowance." They assume that the officer may be serving in one capacity at one time and in another capacity at another time, but that it shall still count as the service of an officer of a county council.

For the reasons given by Talbot J., which I do not repeat because I so entirely agree with them, and in the few additional remarks I have made as to the meaning of the relevant words, I think this appeal fails. I say that as a judge. As a man I am sorry for the appellant, but I have no authority to act as a Parliament to legislate; my duty as a judge is simply to interpret to the best of my ability the words used by Parliament, and I think Parliament overlooked people in the position of the appellant, and did not imagine that a man who was a porter in one institution would become a male nurse in another. I think it is a casus omissus, but we cannot supply the omission.

LAWRENCE L.J. I also agree with the judgment of Talbot J. and with the reasons given by that learned judge, and I have nothing to add.

GREER L.J. I agree.

*Appeal dismissed.*

Solicitors for appellant: *Pritchard, Englefield & Co., for Booth & Booth, Manchester.*

Solicitor for respondents: *Solicitor to the London County Council.*

R. F. S.

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*May* 3, 4.

## MODERN LIGHT CARS, LIMITED *v.* SEALS.

1932. M. 3879.

*Hire-purchase—Agreement for letting of motor-car with option of purchase—Payment to be by instalments with promissory note for total amount—Sale of car by hirer during currency of agreement—Title of purchaser—Construction of agreement—Hire-purchase agreement—Promissory note only collateral security.*

By an agreement in writing it was agreed between the plaintiffs as owners of a motor-car and a hirer thereof that the plaintiffs should let the vehicle to the hirer for a sum payable in part on the execution of the agreement and as to the balance in monthly instalments; that on the execution of the agreement the hirer should give to the plaintiffs a promissory note for the total amount of the monthly instalments, the promissory note to be given not as payment of the instalments but as collateral security therefor; that during the agreement the hirer should not sell the vehicle; and that on payment of all moneys under the agreement the hirer should have the option to purchase the vehicle for one shilling. The hirer, having pursuant to the agreement given a promissory note to the plaintiffs, the latter discounted it with a finance company. During the currency of the agreement and in breach thereof, the hirer sold the vehicle to a purchaser who sold it to the defendants. In an action by the plaintiffs against the defendants claiming possession of the motor car or damages for its detention and conversion.

*Held*, that the agreement was a hire-purchase agreement and was neither a sale on credit, an agreement to sell, nor a bill of sale; that the promissory note was given only as collateral security for the instalments and not in payment thereof; and that the plaintiffs were entitled to judgment in the action.

*In re Rankin and Shiliday* [1927] N. I. 162 adopted.

Action tried by Roche J. without a jury.

By an agreement made on June 4, 1932, between the plaintiffs, Modern Light Cars, Ld., therein called "the owners," who were motor-car dealers, and Mrs. V. M. Sherrard, therein and hereinafter called "the hirer," it was provided (clause 1) that the plaintiffs agreed to let and the hirer to hire a Standard sixteen motor-car for a term of 24 months for the sum of 284*l*. 13*s*., payable as to 63*l*. 15*s*., being the first month's hire in advance, on the execution of the agreement, and as to the balance of 220*l*. 18*s*. in equal monthly payments of 9*l*. 4*s*. 1*d*. each, payable on the fourth day of each month, the first of such payments to be paid on July 4, 1932; (clause 2) that simultaneously with the execution of the agreement the hirer agreed to pay the said sum of 63*l*. 15*s*., and to execute and deliver to the plaintiffs a promissory note made payable to the owners for the total amount of the monthly payments payable in equal instalments on the due dates of the monthly payments respectively, and such of the instalments bearing interest after maturity until paid at the rate of 6 per cent. per annum, such promissory note to be given and received not as payment of the monthly payments but as collateral security for the due payment thereof; (clause 3) that during the agreement the hirer should retain the vehicle in his own possession, and should not sell, offer for sale, assign or charge the same, nor create any lien thereon ; and that it should remain the property of the plaintiffs unless and until the hirer exercised the option to purchase contained in clause 11 thereof after becoming entitled to do so ; (clause 4) that should the hirer make default for ten days in payment of any instalment or other sum payable thereunder as agreed, or fail to observe or fulfil any condition in the agreement, the plaintiffs should have the right at any time to retake possession of the vehicle, and thereupon the agreement should cease and determine ; (clause 9) that the hirer might at any time determine the hiring by returning the vehicle to the plaintiffs without prejudice to the rights of the latter in respect of any antecedent breach of the hirer's covenants ; (clause 10) that the hirer agreed to pay, should the owner re-take possession under clause 4 before the expiration of eleven months from the date of the agreement, such further sum as with the total amount previously paid would equal the sum of 170*l*. as agreed compensation for the depreciation of the vehicle ; and (clause 11) that on payment of all moneys under the agreement the hirer should have the option to purchase the vehicle for one shilling.

Pursuant to clause 2 of the agreement, the hirer duly paid to the plaintiffs the sum of 63*l*. 15*s*., and executed and delivered to them a promissory note for the monthly payments.

On September 6, 1932, the hirer, in breach of the agreement, sold the car to a Mr. Randall, who bought it in good faith and without knowledge of the agreement.

On September 22, 1932, Mr. Randall sold the car to Messrs. Seals, the defendants, for 135*l.*, and it was delivered to them.

On November 28, 1932, the plaintiffs brought the present action against the defendants, claiming possession of the car or its value and damages for its detention and conversion.

The defendants said that the plaintiffs were not entitled to possession of the car; that the agreement was not a hire-purchase agreement; and that if necessary they would rely on the Bills of Sale Acts, 1878 and 1882, and the Sale of Goods Act, 1893.

The plaintiffs had endorsed the promissory note soon after they received it to the United Dominions Trust, Ld., for 191*l.* 5*s.* (1)

The hirer had paid the instalments and other moneys under the agreement up to November, 1932.

The defendants, after they had received notice of the plaintiffs' claim, sold the motor-car. They did not sell it surreptitiously or dishonestly, or in any way with which

(1) An agreement dated Oct. 30, 1930, had been made between the plaintiffs and the United Dominions Trust Company, thereinafter called "the company," by which, after it had been recited that the plaintiffs had entered into or were about to enter into hire-purchase agreements substantially in the form annexed thereto (that being the form in accordance with which the above agreement of June 4, 1932, was made), and that the plaintiffs had requested the company to grant financial facilities by purchasing the notes or bills referred to in clause 2 of that form, which the company had agreed to do on the terms thereinafter contained. It was agreed that the plaintiffs would deposit with the company the said hire-purchase agreements when entered into and would whenever called upon to do so by the company assign to the company, or to any company, firm or person to whom the company might have negotiated such notes or bills all the contractual rights and interest of the company in all or any of the said agreements and in the meantime until such assignment should have been made would stand possessed of the hire-purchase agreements and of all their contractual rights thereunder in trust for the company or for any such company, firm or person as aforesaid: Provided that the chattels themselves which were the subjects of the hire-purchase agreements were not intended to be assigned nor included in the declaration of trust therein contained, and that nothing therein contained should be deemed or construed to extend to the proprietary rights of the plaintiffs in the said chattels, but only to the contractual rights under the hire-purchase agreements as distinguished from such proprietary rights.

fault could be found, except that, if they were wrong in denying that the plaintiffs were entitled to possession of the car, it was a tortious sale because their own possession of the car was tortious. They represented to the plaintiffs that it was in the interest of all parties concerned that the car should be sold. The plaintiffs complained that that subsequent sale of the car by the defendants as well as their original possession of it amounted to a conversion.

*Tucker K.C.* and *Russell Vick* for the plaintiffs. The agreement between the plaintiffs and Mrs. Sherrard was a hire-purchase agreement under which the plaintiffs continued to be the owners of the motor-car and she became the hirer of it and as such liable to make the specified monthly payments of hire for the prescribed period and to give a promissory note as collateral security for these payments with the option of purchase when all the payments had been made. The agreement is not an agreement for sale even though it contains a stipulation that on payment of all moneys due under it the hirer shall have an option to purchase, and though both parties to it may have contemplated that it would end in a sale : *Helby* v. *Matthews*. (1) As the agreement expressly provides that the promissory note shall be given and received as a collateral security and not as payment of the monthly instalments, neither the fact that the hirer gave the promissory note to the plaintiffs, nor the fact that the plaintiffs discounted it, constituted payment of the price of the car so as to effect a sale vesting the property in the car in the hirer and enabling her to sell it to a purchaser. In view of these provisions of the agreement and in all the circumstances the plaintiffs are the owners of the vehicle, and entitled as such to maintain this action of conversion against the defendants : *Continental Guarantee Corporation* v. *Mercado* (2) ; *In re Rankin and Shiliday* (3) ; *Chown* v. *Marshall* (4) ; and *Cooper* v. *Oswald Tillotson, Ld.* (5) The plaintiffs being entitled under the agreement to recover the car or damages for its detention, are in a position to dispense with the collateral security of the promissory note.

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(1) [1895] A. C. 471.

(2) Unreported.

(3) [1927] N. I. 162.

(4) " Times " Newspaper, Dec. 19, 1925.

(5) Unreported. Decision of Goddard J. on April 28, 1933, at Liverpool Assizes.

*Gordon Alchin* and *H. E. R. Boileau* for the defendants. The plaintiffs cannot maintain an action for the conversion and detention of the motor-car against the defendants. The transaction between the plaintiffs and Mrs. Sherrard as appears from the express terms of the written agreement between them and from the circumstances consisted of an immediate transfer of the property in the car from them to her and of the simultaneous delivery by her of the promissory note to cover the total payments. It was a transaction of one or other of several forms. It may be regarded as a sale of the motor-car on credit, the plaintiffs allowing credit for the price on the promissory note being given. Another view is that it was an agreement for the sale of the motor-car such as is contemplated by s. 25, sub-s. 2, of the Sale of Goods Act, 1893, under which Mrs. Sherrard, having obtained possession of the car, became entitled to deliver or transfer it to a third party. It is similar to the agreement which was held to be an agreement for sale in *Lee* v. *Butler* (1); and it differs from the agreements which were held not to be agreements for sale in *Helby* v. *Matthews* (2) and *Belsize Motor Supply Co.* v. *Cox* (3) inasmuch as it does not empower the hirer to terminate it at any time by returning the property to the owner. Alternatively, this agreement was an absolute bill of sale by which the property in the car was immediately transferred to Mrs. Sherrard, she giving the promissory note in payment of the price. Agreements in this form have been used as bills of sale. If this agreement was an agreement of any of these descriptions it had the effect of passing the property in the motor-car to Mrs. Sherrard and enabling her to dispose of it as she pleased. The agreement on its true construction was not an agreement for the hire-purchase of the motor-car and the giving of a promissory note as collateral security for payment of the instalments of hire.

(1) [1893] 2 Q. B. 318.
(2) [1895] A. C. 471.
(3) [1914] 1 K. B. 244.

Under its provisions the liability of Mrs. Sherrard in respect of payment was greater than that which she would have incurred under a hire-purchase agreement. The provision in clause 10 as to the hirer paying 170*l.* as compensation for depreciation of the vehicle does not imply that under the agreement the property in the vehicle has not passed to Mrs. Sherrard, because that provision only applies in the special case where the plaintiffs take possession of the vehicle under clause 4 on the hirer committing a breach of the agreement by selling the vehicle or otherwise, and here the plaintiffs did not take possession of the vehicle. The fact that the plaintiffs discounted the promissory note as soon as they received it shows that it was given and received in payment of the sums payable under the agreement and not as collateral security therefor. Even if the agreement was one of hire-purchase and the sale of the car by Mrs. Sherrard accordingly wrongful, the plaintiffs, having since the sale accepted payments under or by the promissory note, are not now entitled to maintain against her an action for conversion of the car. In any case, the right of the plaintiffs to bring an action of conversion against her was suspended during the currency of the promissory note. The plaintiffs recognised that they were not entitled to bring an action of that kind, and they only brought it after a delay of two months and under pressure of a claim by the defendants to retain the car. The case of *Cooper* v. *Oswald Tillotson, Ld.* (1), is distinguishable, because there the plaintiff had described the negotiable instrument as a collateral security. The plaintiffs have sustained no damage, because the promissory note is still outstanding and they could bring an action upon it and recover any sum due to them under the agreement which remains unpaid. The defendants, however, consent to the damages being assessed at 140*l.*

*Tucker K.C.* in reply. It does not appear either from the written terms of the agreement or from the surrounding circumstances that the property in the motor-car ever passed from the plaintiffs to Mrs. Sherrard so as to enable her to sell the car to a third person. To say that the property in the car passed from the plaintiffs to her when she gave the promissory note is inconsistent with the express provision in the agreement that the note was to be given and received not in payment of, but only as collateral security for, the instalments payable by her in respect of the car. Where a promissory note is given by a debtor to his creditor as collateral security for the debt, the giving of it does not suspend or extinguish the creditor's right to sue for his debt: see Chalmers' Bills of Exchange (10th ed.), p. 365; except in the very special case dealt with in *Peacock* v. *Purssell.* (1) If the sale by Mrs. Sherrard was a breach of the agreement, the acceptance by the plaintiffs after that breach of payments under or by the promissory note was not a repudiation by them of their right to recover possession of the car under the agreement and did not therefore prevent them from maintaining an action of trover or conversion.

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(1) Unreported. Decision of Goddard J. on April 28, 1933, at Liverpool Assizes.

Roche J. This is an action for damages for conversion of a motor-car which had been hired from the plaintiffs under an agreement which they allege is a hire-purchase agreement. The defence, in substance, is that the agreement is not a hire-purchase agreement at all. The case has been very elaborately argued on both sides, and not least by Mr. Alchin for the defendants. It is out of no disrespect to his argument that I propose to make my judgment extremely short. I do so because during the course of the argument I have already dealt with most of the matters of fact that arise, and stated what my conclusions are on these matters, and it is not necessary to repeat them in other than a summary form.

The case is said by Mr. Alchin to be in the nature of a test case, and I think that it is in a sense a case of that kind. It appears that the document here relied upon as a hire-purchase

(1) (1863) 32 L. J. (C. P.) 266.

agreement is in a form adopted in particular by the United Dominions Trust Company, which is a company concerned in connection with this case, and by certain joint stock banks, but that there is another form rather more common and more akin to the form considered by the House of Lords in the well known case of *Helby* v. *Matthews* (1) and that certain persons or companies who are concerned with the use of that form, and with whom the defendants, themselves motor-car dealers, have dealings, have either encouraged or advised the defendants in connection with this case, and that these persons or companies are interested in the determination of this case, as well as the defendants, and the United Dominions Trust Co. All these persons are concerned and interested in this case, and in that sense it is a test case. If it is a test case then, if the parties or either of them desire that it should be dealt with by another tribunal, it is open to them to take it there.

Although there are no decisions binding upon me in this case, I think that, having regard to the conclusions of fact at which I have arrived, the decisions of two or three Courts, to which I will refer more particularly in a moment, are such that I am almost bound to follow them, and I propose to do so all the more readily because I myself agree with them.

I find the facts, stating them in summary, or outline form, to be these: [His Lordship stated the facts substantially as above set out and continued as follows:]

Various topics arise, and Mr. Alchin has put them before me in five or six propositions. Broadly speaking, his submission is that this agreement is not a hire-purchase agreement at all. He says with regard to it that one must look at the reality of the transaction, and not at its form, a proposition which is abundantly right and has the high authority of the House of Lords, both in *McEntire* v. *Crossley Brothers, Ld.* (2), and in *Helby* v. *Matthews.* (1) He contends on behalf of the defendants that if the real nature of the transaction be looked at, it was either a sale on credit, or a bill of sale, or an agreement

(1) [1895] A. C. 471.

(2) [1895] A. C. 457.

to sell. If it was a sale on credit to Mrs. Sherrard, of course she has a title to and property in the goods, and she could sell them to the defendants through Mr. Randall as intermediary, who bought them from her and sold them to the defendants. If it was a bill of sale then as it is unregistered it is void and everything which it purports to effect is bad, and in that case also Mrs. Sherrard could sell the car and give a title to it. If it was an agreement to sell the car to Mrs. Sherrard, then as she was in possession of the car it follows that under s. 21, sub-s. 2, of the Sale of Goods Act, 1893, she could give, and did give, a good title to it. As to all those contentions my finding of fact is that this agreement was intended to be, and was, a hire-purchase agreement. It is the same conclusion of fact as was arrived at on a different document by the successive tribunals, and, in particular, by the House of Lords, in the case of *Helby* v. *Matthews*. (1) I think the document meant exactly what it said, and that the parties intended to do exactly what the document said they were doing. It follows that I find as a fact that it was not a sale on credit, that it was not a bill of sale, and that it was not an agreement to sell. Perhaps the strongest point in the argument which was addressed to me by Mr. Alchin was based upon the matter which forms the distinguishing feature of this hire-purchase agreement, namely, the position of the plaintiffs as dealers in regard to the financing of the transaction. In the other class or type of hire-purchase agreement a financier or banker, who is finding the money and who as a rule is quite a different person from either the dealer or the purchaser of goods such as cars, makes himself the owner of the property, and then hires it out on a hire-purchase agreement to the person who is going to use it, and who has the option to purchase it. In this case the method adopted is different. The motor dealer hires out the car with an option of purchase and remains the owner, while the financier or person who advances funds for the purpose of facilitating and making possible the transaction remains a mere financier. That fact in itself, so far from militating against the conclusion that

(1) [1895] A. C. 471

the document embodying the transaction is what it purports to be, namely, one of hire-purchase, to my mind tends the other way, because it is much more in accordance with the realities of a transaction of hire-purchase that the dealer should himself hire or lend out the car than that some one else should do so.

The point, however, is made that under the scheme and document of hire-purchase Mrs. Sherrard, the hirer, has given to the plaintiffs, the dealers, a promissory note or promissory notes which cover all the instalments of hire-purchase, that they have been dealt with by being transferred to the United Dominions Trust Company, the financial or banking company, and that that fact shows that a payment has been made which leads to the conclusion that the transaction is one of sale, or one of agreement for sale. Whether that is so or not depends, I think, upon what the promissory note was. I hold that it was precisely what it was said to be, namely, a note given by way of collateral security. Several difficult points arise as to whether it is an apt phrase to say that the note was capable of being discounted or was discounted in the ordinary sense, and what the rights of a holder of the note could be. Having regard to the form in which this note is drawn, I find it almost impossible to see that there ever could be a holder of it who would be a holder for value, and have any better rights under it than the plaintiffs would have. It is, however, unnecessary to determine that point, and it is probably unwise to express any further opinion about a matter which might arise hereafter between different parties. It is sufficient to say that there is nothing in that which it was contemplated should be done with this note, or in that which was in fact done with it, which makes me alter my conclusion derived from all the facts of the case that the intention of all parties was that the note should be given by way of collateral security, and not by way of payment, conditional or otherwise.

That sums up my conclusions of fact, and it is all that it is necessary for me to say about that part of the case.

Something should be said about the authorities to which I have referred. They are three in number and two of them are unreported, but I think that all, without exception, arise out of documents which are in all material respects the same as the documents in the present case. I think, also, that it is true to say that they all arise and were decided upon documents in use by the bank or finance company which is concerned in the present case, namely, the United Dominions Trust Company, or by their predecessors in business. The first of these three decisions is : *Continental Guaranty Corporation, Ld.* v. *Mercado.* (1) That case having come before the Mayor's court, the Recorder sitting there had formed a conclusion unfavourable as a matter of business and also as a matter of law, to the Guaranty Corporation, which was relying upon documents, such as the promissory note given pursuant to this arrangement, as collateral security. That adverse opinion, both as a matter of business and of law, was not shared on appeal by the Divisional Court consisting of Acton and MacKinnon JJ., and there is a good deal in their judgments which affords me guidance in this case.

The next decision is that of the Court of Appeal of Northern Ireland in *In re Rankin and Shiliday* (2) to which, though of course it is not binding upon me, I naturally pay the greatest respect, and it seems to me to be in consonance with the conclusions which I should draw in this case. There the Curtis Automobile Company, the owners of a motor omnibus, had entered into an agreement, undistinguishable in my judgment from the agreement in this case, to let the omnibus with an option of purchase to hirers who were to pay an initial sum and certain monthly instalments, and to give bills of exchange as security for the instalments. The Lord Chief Justice in the court of first instance had held on that agreement that assuming that it was a hire-purchase agreement it was void in law, so that, as soon as the owners, who were in much the same position as the plaintiffs in this case, turned the bills into cash, the instalments were all paid off, and from that moment the purchase was completed. That opinion and decision was reversed by the Court of Appeal consisting of Andrews and

(1) Unreported. (2) [1927] N. I. 162.

Best L.JJ., and I should desire to adopt in its entirety the reasoning of those two judges. The arguments addressed to the Courts of Northern Ireland were not, perhaps, precisely put in the same way as the arguments that were addressed to me, but they were based on substantially the same facts, and were directed to obtaining the same conclusion from the Court.

The last decision to which I want to refer is that of Goddard J., in *Cooper* v. *Oswald Tillotson, Ld.* (1) That case was tried at the last Liverpool Assizes, and the judgment, of which a shorthand note has been furnished to me, was given as lately as April 28, 1933. That case also turned on a hire-purchase agreement in the same form as the agreement in the present case, and the decision, in my judgment, supports the conclusion at which I have arrived in the present case.

I have also been referred to the case of *Chown* v. *B. S. Marshall* (2), a decision of Fraser J., which, in my opinion, throws less light on this matter than the other three cases to which I have referred. Those are the authorities which I adopt and follow in the present case.

There are one or two other points with which I have to deal. One of these is the question of fact whether Mr. Randall did or did not buy the car bona fide and without notice of any defect in Mrs. Sherrard's title, and as to that I would be glad to hear the views of counsel. [After a short conversation with counsel on both sides his Lordship continued :] I have just asked counsel what they say about Mr. Randall's position, and whether it was proved that he bought bona fide and without notice. That question does not arise, of course, on my findings as to what the agreement was. It only arises and becomes material if what is called a hire-purchase agreement was an agreement to sell. But, as counsel for the defendants has very naturally asked for my decision upon the question, I will give it, lest this case should go elsewhere and the matter should become material. I have seen Mr. Randall. I think that he did satisfy himself—I think that he was very easily satisfied—

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(1) Unreported. (2) "Times" Newspaper, Dec. 19, 1925.

that Mrs. Sherrard had a right to sell. I do not think that he would have run the risk of what he did with regard to the property unless he had thought bona fide that Mrs. Sherrard had a right to sell. That disposes of that matter.

Another point with which I have to deal is whether the promissory note prevents the plaintiffs from bringing an action of this kind at present. A contention was put forward by Mr. Alchin that the remedy to re-take possession of the car was suspended while the note was current. That was not the contention which Mr. Alchin preferred to put in the forefront about the note. His main contention about the note was naturally directed to its being payment, and to the fact that it was given being evidence that the transaction was a sale, or an agreement to sell. He did, however, rely upon that further point, as it had been relied upon, I think, in the case in the Court of Northern Ireland. The answer assigned in the judgment in that case seems to me to be a proper answer to that point, and I should desire to express myself in no other way.

The last point that I need mention other than the point about damages, is that raised by the contention for the defendant that if the sale by Mrs. Sherrard was wrong and unauthorized yet payments were accepted under the promissory note, or by the note, after that breach of agreement was committed, and that the plaintiffs, after acceptance of payment, had lost their right to re-take possession, and accordingly were not in a position to maintain an action for trover or conversion. I do not agree with any of those propositions. The payments were not taken by the plaintiffs themselves, and even assuming that they were taken on their behalf by their agents, in my judgment the plaintiffs have done nothing to preclude them from the right to re-take the car, a right to possession of it, and a right to maintain this action for trover. Amongst other reasons against the contention is this, that there was, on any showing, under the depreciation clause in the hire-purchase agreement, as much, or more, owing as was taken in these payments which are objected to as precluding the plaintiffs from their right to maintain the action.

The last matter is that of damages. There has been a discussion in several cases of the question whether the right of the plaintiffs in cases such as this is not a right to recover the market value of the goods in question, which is the general measure of damages in an action of trover, or whether it is not limited to the further sums that at the date of the tort could be recovered by the plaintiff in the action under the hire-purchase agreement. Mr. Tucker, while making no admission as to the correctness of the latter view, has expressed his willingness to accept a sum of 140*l.*, which is the amount that could be recovered under the hire-purchase agreement, as the amount of damages recoverable in this case, and Mr. Alchin has accepted that figure as being sufficiently correct for the purposes of my judgment. I adopt that figure and give judgment for the plaintiff for 140*l.*, with the costs of the action less an item of 5*l.*

As I have said before certain topics or matters are not dealt with in this judgment, but I have dealt with them in the course of the argument, and I do not intend to deal with them again. It is sufficient to say that I have taken into consideration all those matters that have been brought before me.

*Judgment accordingly.*

Solicitor for plaintiffs: *H. Huband Harper.*
Solicitor for defendants: *G. H. Drury.*

J. R.

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[1952] 2 Q.B. 545

# G. H. MYERS AND COMPANY *v.* BRENT CROSS SERVICE COMPANY.

*Contract—Work done and Materials supplied—Latent Defect—Absence of Negligence—Implied Warranty.*

The plaintiffs entrusted a motor-car for repair to the defendants, who were garage proprietors and repairers of motor-cars. In the course of repairing the car the defendants obtained from the makers of the car, and fitted, six new connecting rods. One of these rods had a latent defect, which the defendants could not by reasonable care or skill have discovered, and it broke, causing extensive damage to the engine. The plaintiffs brought an action in the county court claiming damages from the defendants, but the county court judge gave judgment for the defendants on the ground that he was not prepared to hold, in the absence of direct authority, that in a contract for work done and materials supplied there was an absolute warranty that the materials supplied were fit for the purpose. The plaintiffs appealed:—

*Held*, by the Divisional Court (Swift and du Parcq JJ.), that the warranty implied in a contract for work done and materials supplied as to the fitness of the materials was not less than that implied in a contract for sale of goods—namely, an absolute warranty of fitness. But that warranty might be excluded if it appeared that the person giving the order did so in such a form as to show that he did not rely on the contractor's skill and judgment. The case must therefore go back to the county court judge for him to determine on the evidence whether the implied warranty was in fact excluded or not.

*Francis* v. *Cockrell* (1870) L. R. 5 Q. B. 501 and *Randall* v. *Newson* (1877) 2 Q. B. D. 102 considered and applied.

Appeal from Willesden County Court.

The plaintiffs, G. H. Myers and Co., were the owners of an Essex motor-car, and in October, 1932, they entrusted it to the defendants, Brent Cross Service Co., who were garage proprietors and repairers of motor-cars, for repairs. The defendants were instructed to execute such repairs as were necessary to cure a " knock " in the engine, and to renew any parts which, in their opinion, required replacement. The defendants, in pursuance of those instructions, obtained from the Hudson Essex Co., Ld. (the manufacturers of the car), or their authorised agents, six connecting rods, which they fitted to the engine, and for which they charged as an item in their account: " To supplying six remetalled rods, 2*l.* 10*s.*"

On November 9, 1932, one of the connecting rods broke, causing extensive damage to the engine. The plaintiffs sued the defendants in the Willesden County Court, claiming 69*l*. 18*s*. for the cost of repairing the car and consequential damages. They alleged that either (1.) the defendants had supplied a wrong type of connecting rod, or (2.) that the work had been done negligently and improperly, or (3.) that one of the connecting rods was defective. The defendants denied the first two allegations, and the county court judge found in their favour on these issues. He came to the conclusion that the breaking of the rod was due to an undiscoverable latent defect. The plaintiffs contended that there was, nevertheless, an implied warranty that the rod supplied was reasonably fit for the purpose, and that the defendants were liable. The defendants contended that there was no implied warranty except that they should exercise reasonable care, which they had done. The county court judge entered judgment for the defendants on the ground that, in the absence of authority, he was not prepared to hold that in a contract for work done and materials supplied there was an absolute warranty that the materials supplied were fit for the purpose.

The plaintiffs appealed.

*Eric Sachs* for the plaintiffs. The county court judge fundamentally misconceived the nature of the warranty in a contract for work done and materials supplied, as distinct from a contract for sale of goods. It is submitted that in a contract for work done and materials supplied there is an implied warranty that the materials are reasonably fit for the purpose. That is the warranty now implied by s. 14 of the Sale of Goods Act, 1893, in certain cases of sale of goods, but the judge has held that in the case of work done and materials supplied, the warranty is only that the vendor should reasonably believe that the materials were fit. If that view is right, the position would be this: if the plaintiffs had bought the faulty connecting-rod from the defendants and had fitted it themselves, the defendants would have been liable; why should they escape liability because they not only supplied but fitted it? It has never been suggested that the contractor's warranty in a building contract is limited in this way.

There appears to be no direct authority, but the principle is that stated in *Francis* v. *Cockrell* (1); *Randall* v. *Newson* (2); and *Frost* v. *Aylesbury Dairy Co.* (3)

No point was taken that these were proprietary parts, nor was it suggested that the defendants were under an obligation to go to get Hudson Essex parts from the Hudson Essex Company. It would be very inconvenient if liability in a case like this depended on where the contractor in fact had obtained the materials. *Preist* v. *Last* (4) is an authority for the proposition that where the goods supplied are only adapted for one purpose, the first condition required by s. 14 of the Sale of Goods Act, 1893, is fulfilled.

[Swift J. The distinction between the contracts for work done and materials supplied and for sale of goods is discussed in *Lee* v. *Griffin.* (5)]

In *Vogan & Co.* v. *Oulton* (6) Wright J. held that in a contract for the hire of a chattel there was an implied warranty that it was reasonably fit for the purpose for which it was hired, and that view was not challenged when the case went to the Court of Appeal.

The right principle, it is submitted, is that the test laid down in *Randall* v. *Newson* (2) applies equally to the three classes of cases—contracts for sale of goods, contracts of hire and contracts for work done and materials supplied. In all those cases, if persons supply goods in pursuance of the contract, it is reasonable that unless they make a special contract, there should be one and the same warranty that the goods are reasonably fit for their purpose. To hold otherwise would introduce unnecessary distinctions.

*Werninck* for the defendants. The contract for work done and materials supplied is one and indivisible. The only obligation on the contractor is to use care and skill reasonably

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(1) L. R. 5 Q. B. 501.
(2) 2 Q. B. D. 102.
(3) [1905] 1 K. B. 608.
(4) [1903] 2 K. B. 148.
(5) (1861) 1 B. & S. 272.
(6) (1898) 79 L. T. 384.

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appropriate to the work. It is wrong to introduce into such a contract the principle of such a case as *Randall* v. *Newson* (1) which was a case of goods sold purely and simply.

It is equally wrong to divide the contract and say: "So far as there is a supply of parts, there is a sale of the parts, and to that extent *Randall* v. *Newson* (1) or s. 14 of the Sale of Goods Act, 1893, applies." Here there was a mere exchange of old parts for new, which is even stronger than the case where the contract involves a supply of new materials. As to the indivisibility of the contract see *Anglo-Egyptian Navigation Co.* v. *Rennie.* (2) The distinction is well illustrated by the case of a contract for the supply of boilers for a ship as in *Anglo-Egyptian Navigation Co.* v. *Rennie* (2) though the question of warranty did not actually arise. If the boilers were to be delivered to the shipowners to be fitted by the shipowners' engineers that would be a sale of the boilers, and, subject now to the conditions specified in s. 14 of the Sale of Goods Act, 1893, there would be an implied warranty of fitness. But if the contractors were themselves to supply and fit the boilers, then the contract is for work done and materials supplied, and the warranty is only to use reasonable care.

[DU PARCQ J. The distinction, if you are right, appears very artificial.]

The attempt to make the same warranty applicable to all cases is not feasible; in the case of sale the warranty does not arise unless the conditions named in s. 14 are fulfilled; in the case of hire the warranty is that the article is as fit as reasonable care and skill can make it.

DU PARCQ J. In this case my Lord has asked me to deliver judgment first.

This is an appeal from His Honour Judge Higgins. The defendants in October, 1932, contracted to do certain repair work to a motor-car belonging to the plaintiff. It was their business to do such repairs as would put a stop to a defect which had developed in the car and which showed itself in the form of "knocking." It became

(1) 2 Q. B. D. 102.

(2) (1875) L. R. 10 C. P. 271.

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necessary, as part of the work, to supply six connecting rods. On October 12, 1932, when the defendants made their charge for the work which they had done, there was among the items one as follows : "To supplying six re-metalled rods, 2*l.* 10*s.* 0*d.*" There is no doubt that in one of the rods there was a defect. The result of that defect was that damage was suffered by the plaintiff. About that there is also no doubt, and the learned judge, in an endeavour to save time and expense, assessed the damages, although his view was adverse to the plaintiff's claim. It was not established that the defect was known to the defendants ; on the contrary, the learned judge came to the conclusion that the defect was one which the defendants could not have discovered by the exercise of reasonable care. In those circumstances the question which this Court has to decide is whether the Judge was right or wrong in the view which he took of the law. That view was this. The learned judge said : This is not the case of a sale of goods and, therefore, none of those considerations arise which would arise if it were necessary to decide the case upon the construction of the Sale of Goods Act, or upon common law decisions prior to the Sale of Goods Act, as to the warranties to be implied upon the sale of goods. The learned Judge held, and there is no doubt that he was perfectly right in so holding, that this was a contract for work and labour, and he said, as I understand the judgment, that in a contract of that kind, and certainly in this particular contract, it could not be taken against the person doing the work that he had impliedly warranted that the goods which he supplied, in the sense that he used them to do the work, were of good quality or reasonably fit for the purpose for which he was using them, and that his only obligation was to take reasonable care.

It is certainly true that to decide this case one must not look at the Sale of Goods Act, 1893, because the Sale of Goods Act deals only with the sale of goods, and this is not a contract for the sale of goods. The question may be put in this way : What is, and what was before the Sale of Goods Act was thought of, the contract made by some one who does work and labour, but in the course of doing it supplies goods?

The earliest case to which I think I need refer is the case of *Francis* v. *Cockrell.* (1) That was a case which went to the Exchequer Chamber and was there decided, in which an action was brought against a defendant who had contracted to erect a grand stand for the purpose of viewing some races. That, of course, was a contract to do work and labour. The stand was negligently and improperly constructed, and the plaintiff was one of the persons using it. The stand fell, and the plaintiff was injured. That, of course, is not a direct authority here at all, because in that case there was negligence, and in this case it is not in dispute that no negligence is proved. But there are certain observations in that case which have their importance, especially in the light of later decisions. Kelly C.B. said this: (2) " I do not hesitate to say that I am clearly of opinion, as a general proposition of law, that when one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied." Now it is to be observed there that the learned Chief Baron is applying to a contract which was not a contract technically for the sale of goods at all, words which we are all accustomed to hear applied to a contract for the sale of goods. " That," says the learned Chief Baron continuing, " I hold to be a general proposition of law applicable to all contracts of this nature and character. It is, indeed, subject to a qualification or exception, to which I will hereafter advert, as determined by the case of *Readhead* v. *Midland Ry. Co.* (3); but that qualification extends only to the case of some defect which is unseen and unknown and undiscoverable, not only unknown to the contracting party, but undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary and reasonable means of inquiry and examination." With regard to those latter words one must read them in the light of what was said in the later case, decided seven years afterwards in the Court of Appeal, of *Randall* v. *Newson.* (1) That is a well known case to which Mr. Sachs quite properly called our attention. It was a case of a contract for the sale of a pole for the plaintiff's carriage. The pole broke and the plaintiff was held to be entitled to recover against the defendant although the defect in the pole was a latent defect. What was decided in *Randall* v. *Newson* (1) was that the case of *Readhead* v. *Midland Ry. Co.* (2), which had been relied upon in the Courts below, had no application to a case of the class which the Court was considering in *Randall* v. *Newson.* (1) *Readhead* v. *The Midland Ry. Co.* (2), putting the matter shortly, decided that the carrier of passengers did not warrant the safety of the vehicle absolutely and was not liable if there was a latent defect in it which he could not discover by the exercise of reasonable care. The Court of Appeal said that that case had no application in a contract for the sale of goods and, dealing with *Francis* v. *Cockrell* (3), Sir William Brett, then a Justice of Appeal, said (1): "The case of *Francis* v. *Cockrell* (3) is based upon *Readhead* v. *Midland Ry. Co.* (2) and is therefore of itself no more a binding authority on us in this case than the other. It is true, however, that the Lord Chief Baron, going further than the doubt expressed by Montague Smith J., does recognise the limitation as applicable to contracts of purchase and sale. But the statement of the learned Judge was not necessary, and therefore is not binding, though of course inviting a careful consideration of the older cases. After such consideration, for the reasons before given, we are of opinion that the undertaking of the present defendant was not restricted by the limitations applied to the contract of carriage in *Readhead* v. *Midland Ry. Co.* (2), and that so long as the verdict in this case stands it imposes a liability on the defendant." I should add what is of importance, that after the judgment to which I have just referred had been delivered, Kelly C.B., who was a member of the Court, in assenting to the judgment of the Court, observed (1), that "if the language imputed to him in *Francis* v. *Cockrell* (2) be correctly reported, he must have expressed himself inaccurately, and he had no intention to apply the doctrine in *Readhead's* Case (3) to a contract for the sale and purchase of an article to be applied to a specific purpose." We are, therefore, brought to this view of the law, that in *Francis* v. *Cockrell* (2) it was stated as a general proposition, applicable, as I understand it, to all cases where goods were supplied for a known purpose, that the persons supplying them warranted that they were reasonably fit for their purpose, and that certainly so far as contracts for the sale of goods are concerned, there is no limitation whatever of the nature which had been suggested, that the supplier is not responsible for latent defects.

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(1) L. R. 5 Q. B. 501.

(2) Ibid. 501, 503.

(3) (1867) L. R. 2 Q. B. 412; (1869) L. R. 4 Q. B. 379.

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(1) 2 Q. B. D. 102, 110.

(2) L. R. 2 Q. B. 412; L. R. 4 Q. B. 379.

(3) L. R. 5 Q. B. 501, 503.

Now it is argued that where goods are supplied in the course of a contract to do work and labour, there is no such warranty. I should like to say this, first of all, that it would strike one as very surprising if it were so. It would seem remarkable if, because of some of the technical distinctions which for good and proper reasons the law draws between contracts so closely analogous, there were the great difference suggested by Mr. Werninck between the warranties to be implied in them. For instance, according to his argument, if somebody instructs makers of boilers to supply and fit boilers to a ship in the course of doing repair work there is no warranty that those boilers are reasonably fit for the purpose for which they are required, and there is no liability on the makers for a latent defect. If, on the other hand, an order is given for boilers to be supplied, which will be fitted by the purchaser's own engineers, then Mr. Werninck agrees that there is a warranty that the boilers are reasonably fit. The view to which I have come is that the liability of the person

(1) 2 Q. B. D. 102, 110.
(2) L. R. 5 Q. B. 501, 503.
(3) L. R. 2 Q. B. 412; L. R. 4 Q. B. 379.

supplying goods in the course of doing work and labour is certainly not less than the liability of the person selling goods, and I wish to refer to a very recent decision in the Court of Appeal where words were used by Greer L.J. which seem to me to throw some light upon the matter. I refer to the case of *Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* (1) In that case Greer L.J. delivered a dissenting judgment. There was a claim for damages which was originally heard before Roche J. for breach of warranty on the sale of propellers to be fitted to two ships. It is unnecessary to deal with the facts of the case, but the majority of the Court of Appeal held that in the circumstances it was not shown that the purchaser relied on the skill and judgment of the seller. Greer L.J. thought that in all the circumstances the defendants were liable upon such a warranty, and it is necessary just to say that much about the facts in order to show that although the words of the learned Lord Justice are used in a dissenting judgment, they are none the less valuable He says this (1): "The contract we have to consider is not a contract for work and materials. In such a contract"—that is a contract for work and materials—"it may be right to imply an undertaking that the materials will be of good quality and the workmanship carried out with reasonable skill and care. The contract under consideration is a contract of sale, and the seller gives no undertaking as to the quality of the materials unless the case is brought within one or other of the sub-sections of section 14 of the Sale of Goods Act. The only terms relating to quality, if any, must be such as can be implied in a contract of sale." It will be seen that the learned Lord Justice there in drawing a distinction between a contract for work and materials and a contract of sale, seems clearly to be taking the view that in the contract for work and materials the obligation of the person supplying the materials is not less but rather greater than that of the person supplying the goods in a contract for the sale of goods; and although those words are not binding upon

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(1) [1933] 2 K. B. 141, 195.

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this Court, I am of opinion that it is a true view to take, that the obligation is certainly no less. But it would not be true to say that wherever you find a contract to do work and supply materials it necessarily follows, even apart from special conditions, that the person supplying the materials is liable if some of them are defective by reason of latent defect. That depends upon the terms of the contract, and I think that the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty. There may be circumstances which would clearly exclude it. A man goes to a repairer and says: "Repair my car; get the parts from the makers of the car and fit them." In such a case it is made plain that the person ordering the repairs is not relying upon any warranty except that the parts used will be parts ordered and obtained from the makers. On the other hand, if he says: "Do this work, fit any necessary parts," then he is in no way limiting the person doing the repair work, and the person doing the repair work is, in my view, liable if there is any defect in the materials supplied, even if it was one which reasonable care could not have discovered.

It is said by Mr. Sachs that there was no limitation whatever in the instructions given to the defendants, no limitation whatever to be gathered from the words of the contract. He could have made the parts himself, says Mr. Sachs, or he could have used parts obtained from any maker, and if that were so, then in my view it must be taken that he warranted that the parts which he did use were of good quality and fit for the purpose for which he was using them, and the fact that a defect was latent would not excuse him. On the other hand Mr. Wynn Werninck says that it has been, or it can be established, that expressly or impliedly the defendants were instructed to get parts from the makers, or their recognized agents, and to use those parts, not using their own skill and judgment in the matter at all. If that be so, then I think

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those facts would afford a defence, because they would negative any warranty. In those circumstances, I take the view that this case should go back to the learned county court judge in order that he may hear any further evidence which the parties may wish to call, and that upon the whole of the evidence before him he may determine whether in this case the warranty that would arise, apart from some such considerations as I have suggested, is to be implied or not.

Swift J. I agree, and I do not wish to add anything except that I think the facts must be more fully ascertained in order that the law which has been stated by my brother may be applied to those facts. Here we have an Essex car which was taken in for repair, and we know as a fact that the Hudson-Essex Motors Limited supplied the metal rods which were required for the purpose. The learned county court judge will ascertain, when the matter comes before him again, whether the defendants were contracting in such a way as to bind themselves to exercise their own skill and judgment with reference to the selection of the material, or whether they were bound to get the materials from the original manufacturers of the car.

The result is that, so far as this appeal is concerned, the appeal will be allowed. The judgment will be set aside and the matter will be sent down for a new trial.

*Appeal allowed : new trial ordered.*

Solicitors for the plaintiffs : *Judge & Priestley.*
Solicitor for the defendants : *W. W. Harden.*

J. W. H.

## HILLER *v.* UNITED DAIRIES (LONDON), LIMITED.

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*Landlord and Tenant—Rent Restriction—Dwelling-house—Recovery of possession—Limited Company as Tenant—Manager in Occupation—Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32) *s.* 4.

A limited company were the leaseholders of a shop, with living rooms above in which their manager resided for the purposes of the business. On the expiration of the lease the landlord claimed possession. The company claimed that they were protected by the Rent Restriction Acts, as being in occupation by their manager.

*Held,* that they were not so protected. *Quaere,* per Slesser L.J., how far the Acts are generally applicable to corporations.

*Reidy* v. *Walker* [1933] 2 K. B. 266, and the principle in *Haskins* v. *Lewis* [1931] 2 K. B. 1 and *Skinner* v. *Geary* ibid. 546, approved.

Appeal from the Divisional Court (Acton and Goddard JJ.).

The appellants, the defendants, the United Dairies (London), Ld., were the assignees of a lease of premises at 113 High Road, Wood Green, at a rent of 62*l.* per annum. The premises consisted of a shop which the defendants used in their business as dairymen, and living rooms above, which were occupied by their manager. The plaintiff, the respondent, James Leopold Hiller, was the reversioner, and on the expiration of the lease on December 25, 1931, claimed possession of the premises. The defendants alleged that they were entitled to the protection of the Rent Restriction Acts. At the trial the defendants called no evidence to show the character of the occupation by their manager. The county court judge held that they were not so entitled and gave judgment for the plaintiff. On appeal to the Divisional Court (Acton and Goddard JJ.) on April 24, 1933, the case was not argued, both parties agreeing that it was not distinguishable from the case of *Reidy* v. *Walker* (1) decided by the same Court on March 29 preceding, and the appeal was dismissed.

The defendants appealed.

*R. C. Vaughan* for appellants. This case, in effect, is an appeal from the decision of the same Divisional Court in *Reidy* v. *Walker* (1), where it was held that a limited company

(1) [1933] 2 K. B. 266.

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was not within the protection of the Acts. That case was wrongly decided. It is true that the appellants here could not occupy or reside personally, but they did so by their agent, the manager. This case is distinguishable from *Skinner* v. *Geary* (1) where the occupation was only that of a relative of the tenant who could not therefore be said to represent him. Occupation through an agent or servant seems to be contemplated in these Acts, because s. 13, sub-s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17)—not now in force (sub-s. 3)—provided that the Act should apply to premises used for the public service as it applies to a dwelling-house. User of premises for public purposes would generally be user by a public body who would occupy them by an agent. In *Skinner* v. *Geary* (1) the facts were very special and the Court did not lay down any general principle; moreover this point was not in the mind of the Court. In *Duke of Richmond* v. *Dewar* (2)—where it is true the point was not argued—a hotel company used certain premises for sleeping accommodation for their staff, and it was held they used them as a dwelling-house. Bankes L.J. said (3) "He could see no difference between this case and a case where the hotel company took outside accommodation for one of their managers and his wife. The house so taken would not cease to be a dwelling-house because as between the company and their manager such occupation was for the purposes of the company's business." In *Tennant* v. *Smith* (4), a revenue case, where the agent of a bank resided on the bank premises as custodier, as part of his duty, it was held to be the occupation of the bank, not that of the agent. That is very like this case. In no case has it been held that actual occupation by the tenant himself is necessary, and there is nothing in any of the Acts to show that limited companies are not entitled to their protection. The appellants had a contractual occupation of the premises and were under all the obligations imposed by the Acts, but it is said that they are not entitled to the benefits. It is to be remarked that these Acts have been in existence for eighteen

(1) [1931] 2 K. B. 546.
(2) (1921) 38 Times L. R. 151.
(3) 38 Times L. R. 152.
(4) [1892] A. C. 150.

years and relief has often been given to limited companies, yet this point has never been taken.

[*Hicks* v. *Scarsdale Brewery Co.* (1); *Martin Estates Co.* v. *Watt and Hunter* (2); *Lloyd* v. *Cook* (3); *Gidden* v. *Mills* (4) and *Hicks* v. *Snook* (5) were also referred to.]

*R. Fortune* and *Sir A. Callaghan* for respondent. This case is governed by the principle of the decisions of the Divisional Court in *Skinner* v. *Geary* (6) and of the Court of Appeal in *Haskins* v. *Lewis*. (7) Throughout the Acts are dealing with dwelling-houses, and that implies houses which are dwelt in. The object of the Acts was to protect the place where a man resided, that is, to keep a roof over his head. It is admitted that the company in this case could not reside, but it is contended that the maxim " Qui facit per alium facit per se " applies, and that the company reside through their manager. That cannot be so if *Skinner* v. *Geary* (6) was rightly decided. One cannot delegate a privilege which is personal to oneself—see *Keeves* v. *Dean* (8) per Bankes L.J. To hold that a limited company can dwell within the meaning of the Acts would be to extend their natural meaning, and this the Court will not do in the case of statutes which invade private rights.

LORD HEWART C.J. In this appeal we have heard an able and full argument from Mr. Vaughan for the appellants, but it seems to me that their appeal fails, and fails for this reason, that upon the materials which are before us there is nothing to distinguish the case from the principles laid down in *Haskins* v. *Lewis* (7) and *Skinner* v. *Geary*. (6) The learned judge in the county court was of opinion that evidence had been withheld by the appellants as to the terms upon which their manager resided over the shop where the business of dairymen was carried on. This Court must take the materials which are before it, and I think that the Divisional Court came to a correct conclusion and was following, and rightly following, the two

(1) [1924] W. N. 89.
(2) [1925] N. I. 79.
(3) [1929] 1 K. B. 103.
(4) [1925] 2 K. B. 713.
(5) (1928) 27 L. G. R. 175.
(6) [1931] 2 K. B. 546.
(7) Ibid. 1.
(8) [1924] 1 K. B. 685, 690.

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cases to which I have referred. I think, therefore, that this appeal must be dismissed.

LORD WRIGHT. I agree. The Divisional Court gave no specific judgment in this case because the parties there agreed that the matter was not capable of further discussion, being concluded by the decision of that Court given a short time previously in the case of *Reidy* v. *Walker*. (1) In that case the Divisional Court held that they were concluded by the principles laid down by the Court of Appeal in *Skinner* v. *Geary*. (2) I agree with that conclusion. If the matter was not covered, as I think it is, by the authority of that case I should certainly have required an opportunity of considering the point very carefully. There has been considerable difference of opinion in very authoritative quarters on the question here involved, but the decision of the Court in *Skinner* v. *Geary* (2) lays down quite clearly the principle for the construction of the Rent Restriction Acts, and lays it down in terms which apply precisely, in my judgment, to the present case. I need not now repeat at length what was said by Scrutton L.J., with whom Slesser L.J. agreed, in that case, but I will read one short passage from the judgment of Scrutton L.J. in which he says (3): " In my opinion it has not done so because it "—that is the Act—" never contemplated the possibility of the tenant living somewhere else. A non-occupying tenant was in my opinion never within the precincts of the Acts, which were dealing only with an occupying tenant who had a right to stay in and not be turned out. This case is to be decided on the principle that the Acts do not apply to a person who is not personally occupying the house and who has no intention of returning to it. I except, of course, such a case as that to which I have already referred—namely, of temporary absence, the best instance of which is that of a sea captain who may be away for months but who intends to return. and whose wife and family occupy the house during his absence."

(1) [1933] 2 K. B. 266.
(2) [1931] 2 K. B. 546.
(3) Ibid. 561.

The case of *Skinner* v. *Geary* (1) really followed the principles which had already been laid down by the Court of Appeal in *Haskins* v. *Lewis* (2), where Scrutton L.J. expressed substantially the same view as to the construction of the Act. Romer L.J., who was one of the Lords Justices in that case, put the matter in the way following (3): "It has frequently been pointed out in the Courts, and it has been pointed out once more by Scrutton L.J. in the judgment that he has just given, that the principal object of the Rent Restriction Acts was to protect a person residing in a dwelling-house from being turned out of his home. Where, therefore, when the contractual tenancy comes to an end, the tenant is not in physical possession of any part of the premises, there is nothing in the Act which enables him to resist the claim of his landlord to possession, whether he has gone out without sub-letting the premises or whether he has sub-let the premises as a whole." The Lord Justice there takes as the test the question of physical possession.

As I understand the argument very ably put forward by Mr. Vaughan in the present case it is this, that as the defendants are a company, and, therefore, incapable of physical possession, they ought to be placed in a position better than, and different from, the position of one who is an individual and not a juristic person such as the defendant company. I cannot follow that argument at all. If the rights under the Acts which are given to the statutory tenant are, as this Court has held in several cases, purely personal, I do not see how these rights can be vicariously enjoyed or how the principle of dwelling in the premises by an agent can be admitted. It was naturally not suggested that the manager was a sub-tenant. I do not wish to discuss the matter at any further length or even to consider whether it is possible now to reconcile the case relied upon by Mr. Vaughan of *Duke of Richmond* v. *Dewar and Others* (4) with the principle laid down in the Court of Appeal in the authorities to which I have referred. It is enough to say that in my judgment I think, as Goddard J. very clearly expressed it when

(1) [1931] 2 K. B. 546.
(2) Ibid. 1.
(3) [1931] 2 K. B. 18.
(4) 38 Times L. R. 151.

the case was in the Divisional Court, that the present case is precisely covered by the principles laid down in this Court which are binding upon us. I think, therefore, that the appeal should be dismissed.

SLESSER L.J. I am of the same opinion. This appeal is an important one in this respect that it does appear that in earlier times before the difficult principles were clarified which affect this particular matter there are cases in the books where relief has been given to limited companies who have been tenants. I refer in particular to the case of *Duke of Richmond* v. *Dewar and Others* (1); but since the time when that case and other similar cases were decided various cases have been before this Court which have now, I think, established principles which make it impossible to say that a company such as this one can any longer be a tenant entitled to the protection of the Rent Acts. The cases which have decided that, as my Lords have said, are *Haskins* v. *Lewis* (2) and *Skinner* v. *Geary*. (3) In *Skinner* v. *Geary* (3) Scrutton L.J. at the end of his judgment made it quite clear that before a tenant could avail himself of the protection of the Act he must show that the house or part of the house is in some sense his home. He uses this language (4): " For the reasons I have given the Act does not in my opinion apply to protect a tenant who is not in occupation of a house in the sense that the house is his home and to which, although he may be absent for a time, he intends to return." And again: " A man who does not live in a house and never intends to do so, is, if I may use the expression, withdrawing from circulation that house which was intended for occupation by other people." Goddard J. in the case of *Reidy* v. *Walker* used very much the same phrases where he says (5) " The Court of Appeal lays down the proposition that before a person can become a statutory tenant his occupation must have

(1) 38 Times L. R. 151.
(2) [1931] 2 K. B. 1.
(3) [1931] 2 K. B. 546.
(4) Ibid. 564.
(5) [1933] 2 K. B. 272.

an essentially domestic quality." If that be the test to apply here it is to my mind evident that this trading company cannot have that domestic quality, it cannot have a home, and it cannot in that sense reside. As Lord Loreburn said in *De Beers Consolidated Mines, Ld.* v. *Howe* (1) "A company cannot eat or sleep."

Mr. Vaughan seeks to avoid the difficulty by pointing to the fact that in this case it is found by the learned county court judge that the manager of the shop has been residing over the shop for about six or eight months. Owing to the decision of the company here to call no evidence we do not know the terms on which that manager resided over the shop. If he was a sub-tenant of course that would exclude any possibility of the company seeking the protection of the Act. Even if he was not it is quite impossible in my view for the company to say, as Mr. Vaughan argues, that they occupy this shop and the residence above it through their manager. The occupation under the Act must be of a personal kind. As Bankes L.J. said in *Keeves* v. *Dean* (2): "His [the occupier's] right is a purely personal one, and as such, unless the statute expressly authorizes him to pass it on to another person, must cease the moment he parts with the possession or dies." Here the right, such as it is, is a personal right of tenancy of the company. There is no evidence they have parted with the possession of it and if they had, that would in itself exclude them from any rights here. They cannot by the nature of things reside in a domestic sense, they cannot come or go to these particular premises and they are outside the Act.

I would only add this. I do not intend to decide—it is not necessary to decide in this case—whether the Act can in all circumstances be said not to apply to a corporation. A corporation may be a corporation aggregate or a corporation sole. There may be cases where particular corporations may come within the province of the Act. It is not necessary to decide the point. It is sufficient to say that this trading

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(1) [1906] A. C. 455, 458.

(2) [1924] 1 K. B. 685, 690.

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company cannot come within the Act and that the cases of *Skinner* v. *Geary* (1) and *Haskins* v. *Lewis* (2) exclude it.

*Appeal dismissed.*

Solicitor for appellants: *S. L. MacAndrew.*
Solicitors for respondent: *Payne & Co.*

W. L. L. B.

C. A.
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*Oct.* 10, 11, 12, 13, 30.

## SIMPSON *v.* CHARRINGTON AND COMPANY, LIMITED.

*Landlord and tenant—Goodwill—Termination of tenancy—Compensation—Licensed premises—Report of Referee—Power of County Court judge to vary—Right of Appeal—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4, *sub-s.* 1 (*c*), 5, 21.

The tenant of premises licensed for the sale of intoxicating liquor for consumption off the premises gave notice to his landlord under s. 4, sub-s. 1, of the Landlord and Tenant Act, 1927, that he claimed to be entitled, at the termination of his tenancy on quitting the holding, to be paid by the landlord compensation for goodwill, and further that, as the sum that could be awarded under s. 4 would not compensate him for the loss of goodwill he would suffer if he removed and carried on business elsewhere, he claimed, in the alternative, to be entitled to a new lease in accordance with s. 5. The premises had been licensed during the whole of the applicant's tenancy.

*Held,* (1.) that the claim was not invalid by being stated in the alternative; (2.) that the terms of proviso (*c*) to s. 4, sub-s. 1, of the Act did not debar a tenant of premises where the sale of intoxicating liquor was the sole trade carried on from claiming compensation; and (3.) that the tenant, in order to prove that goodwill had become attached to the premises was not bound to show that he had done more than any tenant of ordinary capacity and energy would have done.

The tribunal under the Act of 1927 for determining the amount of compensation payable to a tenant for goodwill, or determining whether a new lease should be granted to him, is the county court; and in dealing with a report made by a Referee under s. 21 of the Act the county court judge may if he thinks fit adopt, vary or disregard the findings of the Referee. On an appeal from the decision of the county court in such a case the appellate tribunal is bound by the findings of fact of the county court judge unless (1.) there was no evidence to support them, or (2.) the findings are mixed questions of fact and law which turn upon the construction of the statute. A finding as to goodwill is a proper subject of appeal.

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(1) [1931] 2 K. B. 546. (2) Ibid. 1.

Observations as to the effect of s. 4, sub-s. 1, proviso (*d*) (ii), of the Act of 1927.

Decision of the Divisional Court [1933] 2 K. B. 63 reversed.

APPEAL from the decision of the Divisional Court.

The plaintiff was the tenant of premises licensed for the sale of intoxicating liquor for consumption off the premises from 1910 to 1932—from 1910 to 1921 under an agreement with the mortgagees of the original tenant, and from 1921 until March, 1932, when the lease expired, as assignee of the lease. The defendants were the assignees of the reversion expectant on the determination of the lease. The premises constituted a "holding" within Part I. of the Landlord and Tenant Act, 1927. No business other than that of the sale of intoxicating liquor was carried on at the premises.

On March 24, 1931, the plaintiff gave a notice to the defendants, expressed to be under the Act of 1927, of his claim to be entitled, on the termination of his tenancy, to compensation for goodwill under s. 4 of the Act (1) but stating that, as the sum that could be awarded to him under that section would not compensate him for the loss of goodwill he would suffer if he removed and carried on his business elsewhere, he also claimed a new lease in accordance with s. 5.

In June, 1931, the plaintiff instituted proceedings in the county court, claiming (*a*) a new lease of the premises under s. 5

(1) Landlord and Tenant Act, 1927, s. 4, sub-s. 1: "The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner . . . (ii) . . . not more than thirty-six nor less than twelve months before the termination of the tenancy; be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal [i.e., the county court] that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto: Provided that . . . (*c*) in the case of licensed premises the sum payable as compensation for the goodwill under this section shall not include any addition to the value of the premises attributable to the fact that the premises are licensed premises."

on the ground that he was entitled under s. 4 to compensation for the goodwill which had become attached to the premises, but that the sum which could be awarded would not compensate him for the loss of goodwill he would suffer if he removed to and carried on his trade in other premises; (*b*) certain terms of the new lease; and, alternatively, (*c*) the sum of 1700*l.* as compensation under s. 4.

The defendants pleaded that if any goodwill had become attached to the premises so as to increase their value it was wholly attributable to (*a*) the fact that the premises were licensed premises, or (*b*) the situation of the premises, or to those two factors together, and, accordingly, no compensation could be recovered by the plaintiff under s. 4. The defendants also denied that the grant of a new lease would be reasonable, and they pleaded that the plaintiff's statutory notice of March 24, 1931, was invalid as it claimed compensation in the alternative to the claim for a new lease.

The matter was referred under s. 21, sub-s. 2, of the Act to a referee, who reported that the plaintiff had built up a successful business at the premises and had attached a valuable goodwill to them which would enable the landlords to let them at a higher rent than they would have realised had no such goodwill attached to them. The referee also found that the plaintiff would suffer a greater loss if he removed from the premises than the sum which could be awarded as compensation under s. 4, and that the grant of a new lease would be reasonable.

On January 22, 1932, the defendants gave notice to vary the report.

The matter was heard by the county court judge, who held (*a*) that the plaintiff's statutory notice was not bad because it contained alternative claims for a new lease and for compensation; (*b*) that the plaintiff was not more than a normally good tenant and had not done more than any tenant of ordinary capacity and energy would have done, and had failed to prove that goodwill had become attached to the premises by reason whereof they could be let at a higher rent than they would have realized otherwise; and (*c*) that even assuming that the plaintiff had, by special exertion, expenditure and skill, caused an addition to the value of the business, he could not claim compensation in view of the terms of para. (*c*) of the proviso to s. 4, sub-s. 1.

The county court judge therefore dismissed the action. The plaintiff appealed to the Divisional Court, which decided that the terms of the proviso (*c*) to s. 4, sub-s. 1, of the Act precluded the plaintiff, being the tenant of licensed premises where the sale of intoxicating liquor was the sole trade carried on, from claiming compensation under the Act.

The plaintiff appealed.

*Claude Grundy* for the appellant. As pointed out by Scrutton L.J. in *Stumbles* v. *Whitley* (1) the general object of the Landlord and Tenant Act, 1927, is to give to all tenants who have built up a goodwill for the premises occupied by them and who otherwise comply with the requirements of the Act a right, on the termination of their tenancies and quitting their holdings, to compensation in respect of that goodwill. It is now submitted that Parliament has not excluded tenants of licensed premises from the benefit of that Act. The Divisional Court was therefore wrong in holding that there was such an exclusion. This is made clear by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 1, sub-s. 3, of which provides that " where any dwelling-house to which the principal Acts apply consists of or comprises premises licensed for the sale of intoxicating liquor for consumption on the premises, the principal Acts shall . . . . cease to apply to that dwelling house," and sub-s. 6 says that " where upon the expiration of such a notice . . . . a tenant ceases to be entitled by virtue of this Act to retain possession of a dwelling-house, the provisions of the Landlord and Tenant Act, 1927, shall apply in respect of the premises . . . . " That shows that Parliament never contemplated that the tenant of licensed premises by whose exertions goodwill had become attached to the premises should be deprived of the benefit of the Act of

(1) [1930] 1 K. B. 393.

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1927. The language of s. 4, sub-s. 1, proviso (*c*), of the last mentioned Act upon which the judges in the Divisional Court based their decision excluding the appellant from the right to claim compensation assumes by its opening words that compensation may be payable in the case of licensed premises; it merely says that in arriving at the sum payable "any addition to the value of the premises attributable to the fact that the premises are licensed premises" shall not be included. That can have no application to the premises now in question which have been licensed premises during the whole period of the appellant's tenancy. It is clear that goodwill has become attached to the premises through the exertions of the appellant and he is therefore entitled to be paid compensation in respect of that. What is "goodwill" was explained by Lord Macnaghten in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.* (1), as being "the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom." This definition affords no basis for the view taken by the county court judge that a tenant to be entitled to compensation must show that he has taken special steps to create it. Trading in the ordinary way may result, and in this case has resulted, in the creation of goodwill in respect of which compensation is payable or in lieu thereof a new lease should be granted.

*O'Hagan* for the respondents. Firstly, the notice given by the appellant was bad as being in the alternative. A landlord ought to be told specifically what the tenant's claim is, and he is not to be harassed by two different claims.

Secondly, proviso (*c*) upon which the judges in the Divisional Court based their decision, in terms excludes a right to the benefit of the Act of 1927 if the sole trade carried on is the sale of intoxicating liquor. Directly it appears, as it does in this case, that nothing can be earned on the premises except from the sale of intoxicating liquor, the addition to the value of the premises is "attributable" to the fact that the premises are licensed premises. The object of Parliament in enacting proviso (*c*) was to cover such cases as an hotel or a grocer's shop, in which intoxicating liquor may be sold but other goods may be supplied or services may be rendered. In those cases the tenant who has built up a goodwill in the premises will clearly be entitled to compensation under the Act, but the sum payable will be based only on the goodwill so far as it has been created apart from the sale of intoxicating liquor. The county court judge and the Divisional Court were therefore right in deciding that the appellant was not entitled to compensation.

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(1) [1901] A. C. 217, 223.

[Scrutton L.J. What power do you say the county court judge has to depart from the report of the Referee ?]

He is entitled to draw inferences of fact from the Referee's findings, and is entitled, upon a motion to vary the report to depart from it if he thinks fit : see *Clark* v. *Sonnenschein*. (1) Moreover, on the evidence the increase in the trade carried on in the premises could be accounted for on various grounds, including the concession by the landlords not to insist on the tie.

*Grundy* in reply. The county court judge was bound by the findings of fact in the report of the Referee.

*Cur. adv. vult.*

Oct. 30. The following judgments were read :—

Scrutton L.J. This appeal raises important and troublesome questions on the construction of the Landlord and Tenant Act, 1927, described in the preamble as "An Act to provide for the payment of compensation for improvements and goodwill to tenants of premises used for business purposes, or the grant of a new lease in lieu thereof." Before its passing there was strong feeling among tenants that if during their tenancy they had made at their own expense improvements in the leased property, which rendered the premises more valuable, or had built up a business in the premises, which rendered them more valuable for a trade by reason of the probability that customers would continue to resort to the old premises, it was inequitable that those two elements of value should pass to the landlord at the end of the tenancy without compensation to the

(1) (1890) 25 Q. B. D. 226.

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tenant who had created them. Parliament appears to have thought it desirable to remedy what it considered this lack of equity.

Before the Act a system was established by practice by which during the tenancy a tenant who could assign his tenancy, if he assigned it to another tenant, obtained from him a substantial sum for the goodwill. Brett J. explains this in *Llewellyn* v. *Rutherford* (1) thus: "In some classes of business, where the trade has long been carried on in a profitable manner in a particular house, and a new tenant comes in and continues to carry on the same business there, it is found by experience that many, if not all, of the customers resort there as before. This is found so regularly to happen, that it has become usual to pay a money value for it, which is commonly called 'goodwill.' It may be that there may be a species of goodwill which may be the subject of bargain and sale, although not dependent on the business being carried on in any particular place; for instance, in the case of what are called quack medicines. But, when we come to speak of the goodwill of a public house, it is obvious that it is a thing which is attached to a locality. The attractiveness of the building, the quality of the articles supplied there, and the personal qualifications of the individual who conducts the business, all combine to create a trade which is likely to be continued at the particular house. The only person who can make a profit of this is, in general, the person who is about to cede it to another. During the continuance of his lease, the tenant is the person who alone can sell the goodwill; it is a matter arising wholly between the incoming and the outgoing tenant. Where, however, the lease has come to an end, the tenant has no longer any option. It is in the option of the landlord to renew the lease or not, or to grant a lease to a new tenant." According to Brett J. there was then a by no means infrequent arrangement by which by agreement in the lease the landlord at the expiration of the lease should pay to the outgoing tenant such a sum for goodwill as the tenant could have procured if he sold the goodwill to an incoming tenant. But if no such arrangement existed, the landlord at the expiration of the tenancy got the benefit of the goodwill without paying anything for it, and the tenant, if he wanted a renewal of the lease, must pay what the landlord asked for it, either under the name of rent or premium. A large sum for premium was generally included, one of the reasons being that it was supposed that if part of the consideration for the tenancy was in premium, an increase in assessment and liability to larger rates might be avoided. This system caused great trouble in *Poplar Assessment Committee* v. *Roberts* (1), where it was difficult to reconcile for rating purposes the value of the premises as shown by the premium and rent an incoming tenant was willing to pay with the " standard rent " under the Rent Restriction Acts. The Landlord and Tenant Act, 1927, was obviously intended to deal with the case where the tenancy expired without the outgoing tenant having sold the goodwill. Section 4 gives the tenant compensation with certain limitations if he proves: (1.) that goodwill has become attached to the premises; (2.) by reason of the tenant or his predecessors in title carrying on a trade or business on the premises; and that (3.) by reason of goodwill having so become attached to the premises, the premises could be let at a higher rent than they would have realised " had no such goodwill attached thereto." It is very unfortunate that Parliament included no definition of goodwill in the Act, still more so if, as appears to be the case, its omission after much discussion was caused by the difficulty of framing any such definition. Parliament must be taken to have been aware of the general practice as to goodwill and the definition or explanation which had been given of the term by Brett J. in *Llewellyn's* case (2), by Lord Herschell in *Trego* v. *Hunt* (3) and by Lords Macnaghten and Lindley in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.* (4) Lord Eldon defined it in *Cruttwell* v. *Lye* (5) as " nothing more than the probability, that the old customers will resort to the old place." One must assume that Parliament, when it spoke of " goodwill

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(1) (1875) L. R. 10 C. P. 456, 469.

(1) [1922] 2 A. C. 93.
(2) L. R. 10 C. P. 456, 469.
(3) [1896] A. C. 7, 17, 18.
(4) [1901] A. C. 217, 223, 224, 235.
(5) (1810) 17 Ves. 335, 346.

attached to the premises," was aware of these definitions, and limited them to some extent by provisoes.

There is really very little dispute about the facts in the present case. In 1897 Messrs. Lacons, the well known Norfolk brewers, were the head lessees of Avondale Stores, 491 Old Kent Road, a building having an off-licence for the sale of beer, spirits and wine, either sold in bottles, or, in the case of beer, delivered on draught into customers' jugs. Lacons by a sub-lease dated July 13, 1897, granted to one Ellis a term of 35 years expiring March 25, 1932. The premises were "tied," but in the case of bottled beer the landlord did not strictly enforce the "tie." The rent was 90*l.* a year and a premium of 2900*l.* was agreed to be paid. It was not in fact paid in 1897, and though secured by a mortgage of the premises to Lacons, the landlords, was never paid. The business, which then included a small grocery business, was at first prosperous, but before 1905 ceased to be so. Ellis ceased to carry on business in 1905, Lacons entering into possession as mortgagees, and from then till 1910 two other tenants carried on the business without success as yearly tenants of Lacons as mortgagees in possession. Simpson, the present appellant, entered into possession in 1910, at first as yearly tenant of the mortgagees at a rent of 52*l.* a year, which was not enforced against him for the first two years. At the time of his entry the business was described by Dixon, then acting as Lacons' agent, as "in the mud," and he said that Simpson "raised it out of the mud." Simpson abandoned the grocery business. The figures of his income tax assessment are given in the Referee's report, and rise from 160*l.* in 1910 to 1002*l.* in 1924 and 762*l.* in 1930. These figures must, however, be received with caution as, from a document in evidence, from 1910 to 1926/27 they are based on an average of the three previous years, but from 1927/28 to 1931/32 on the figures of the previous year only. The income tax assessment in 1924/25 of 1002*l.* is the result of a net profit in the accounts of 1295*l.* in 1921/22 and 1050*l.* in 1922/23. Simpson changed the nature of his relation to Lacons on September 6, 1921, when he took an assignment of the unexpired term of Ellis's lease at the rent of

90*l*. a year, paying also 300*l*. to Lacons, the two payments being equivalent to an annual payment of about 133*l*.

In 1928 Charringtons, the present respondents, became purchasers of Lacons' interest in the premises under a document which has not been produced to us. They endeavoured to enforce strictly the tie as to bottled beer, which Lacons had not enforced, and by 1932 there was very little bottled beer sold outside the tie.

The original lease to Ellis would expire on March 25, 1932, and on March 24, 1931, Simpson served a notice, the validity of which is one of the questions in the case, claiming (1.) compensation, (2.) in lieu of compensation a new lease, (3.) on failure to grant a new lease, compensation of 1700*l*. On May 20, 1931, Simpson suggested that the new lease should be 90*l*. rental for 14 years with a premium of 750*l*., and a continuance of the relaxed tie ; and in default of a new lease compensation of 2000*l*. Charringtons offered on May 23, 1931, a new lease for 14 years on the usual Charrington covenants, with the strict enforcement of the original tie, at a rental of 90*l*. and a premium of 1400*l*. I understand this would be equivalent to an annual payment of 237*l*.

Prima facie, and without considering at present the various limitations and provisoes of the Act, these facts mean that between 1910 and 1932, the period for which Simpson under various titles has carried on a trade in these premises, the position has improved from a rental of 52*l*. a year not enforced for the first two years to a rental and premium asked by the landlords equivalent to 237*l*. a year.

The Referee finds as follows in paragraph 30 of his report :— "I am satisfied that the plaintiff has during his 21 years' tenancy of these premises attached a valuable goodwill to them which would enable the landlords to let them at a higher rent than they would have realised had no such goodwill attached thereto." The county court judge says : "No doubt the goodwill of the business has increased in value greatly since 1910," and speaks of "the indisputable fact that the goodwill has greatly increased in value since 1910."

A number of questions are raised in the case, and I shall have to express an opinion later as to the most important ones, but the Divisional Court has only considered one, on which they decided in a way which disentitles the tenant to either compensation or a new lease.

Proviso (*c*) of s. 4, sub-s. 1, of the Act of 1927 is as follows: "In the case of licensed premises the sum payable as compensation for goodwill under this section shall not include any addition to the value of the premises attributable to the fact that the premises are licensed." Goddard J. takes a view which he expresses thus: "The meaning of the clause is that where you have a case of licensed premises no compensation is to be given to the tenant for any result which he may have achieved in the carrying on of the premises so far as the sale of intoxicating liquor is concerned. . . . It was intended to preserve to a tenant who carried on a business additional to that of the sale of intoxicating liquors on licensed premises his right to compensation." Acton J. states the argument of the landlord, which "not without doubt, arising from what seems to me the somewhat obscure wording of the clause" he adopts thus: "Where the trade or business carried on at the premises is, as here, nothing but the sale of alcoholic liquors, the meaning of the proviso is that the tenant can obtain neither compensation nor a new lease under the Act, the reason being that in such a case any addition to the value of the premises in relation to the goodwill attaching to them must be directly or indirectly attributable to the premises being licensed premises, and that Mr. Monckton's argument puts too narrow an interpretation on the words 'attributable to.'" The county court judge goes further in expression. Having made a distinction, which I consider later, between a "normally good tenant," who is of "ordinary capacity and energy," and found that Simpson as a tenant, though a "suitable tenant," is only of ordinary skill and energy, and has not used any special exertions, expenditure or skill causing an addition to the value of the goodwill, he held that even if the tenant had as a "super-tenant" caused an addition to the value of the goodwill, he would be prevented from recovering any compensation by proviso (c). This, though the County Court judge says, " No doubt the goodwill of the business has increased greatly since 1910."

I think I have some guidance, which was not before the Divisional Court or the County Court judge, as to the meaning of the Legislature, in the view which in 1933 it must have taken of the meaning of the Act of 1927. In the Rent and Mortgage Interest Restriction (Amendment) Act, 1933, Parliament by s. 1, sub-s. 3, decontrolled all on-licensed premises held by statutory tenants, but by sub-s. 6 of the same section gave to all statutory tenants whose tenancy was thus determined by decontrol the rights which they would have had under the Landlord and Tenant Act, as if they had had a lease. It seems to me it would have been an idle mockery if Parliament was to be taken as saying to the tenant of on-licensed premises, " True, we are terminating your tenancy, but we will give you the rights you would have had under the Landlord and Tenant Act as if you had a lease, but, my poor fellow, that won't help you, for as a tenant of licensed premises under a lease you have no right to any compensation under the Landlord and Tenant Act." I can see no reason why Parliament should except from the right of compensation for goodwill at the end of the tenancy, goodwill, being " the probability of old customers resorting to the old place," tenants of licensed premises, who can admittedly during their tenancy sell such goodwill to incoming tenants. But the question still remains, what do the " somewhat obscure words " of proviso (c) mean ? I think they start by assuming that a sum is payable in the case of all licensed premises under the section, and proceed to say that it shall not include any addition to the value of the premises " attributable to," " due to," " caused by " the fact that the premises are licensed. The obvious case of such addition to the value is where unlicensed premises get a licence, when at once there is an addition to the value ; the premises will let at a higher rent than when they were unlicensed, and that addition to the value is due to the additional fact of the licence. But where, as here, the premises had the same licence at the beginning and end of the tenant's

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trade, I do not see how any addition to value can be due to the licence. Why Parliament thought it necessary to say this I do not know, but I can see no reason why they shut out tenants of licensed houses from the benefit of compensation for goodwill, and I decline to hold they have done so, unless perfectly clear words compel me so to hold. I find no such words. I think therefore the Divisional Court erred in giving as their only reason for dismissing the tenant's appeal the language of proviso (*c*).

But this leaves unsolved the other question the tenant raised, and leaves the question to be answered, " What is the Court of Appeal to do ? " The first step to answering this question is to ascertain what the Court of Appeal can do in an appeal under this Act. The " tribunal " under the Act to determine the amount of compensation, or the terms of the new lease, was in this case the County Court for the district in which the premises were situate. By s. 21, sub-s. 2, of the Act on a claim being made by the tenant, the matter is at once " referred for inquiry and report " to one of the panel of Referees. In this case the Referee held the enquiry on ten days, and the parties having agreed to a shorthand note, added 700 pages of evidence to his report. It was argued before us that to some extent the county court judge was bound by the findings of the Referee, at any rate on the findings of fact, which depend partly on the credibility of witnesses. In my opinion the relation of the county court judge to the Referee for inquiry and report only is the same as that of a High Court judge to such a Referee. A motion to vary the report is necessary if it is to be challenged. On such a motion each judge is at liberty to adopt, vary, or disregard a finding of the Referee, or to hear fresh evidence on any point. This may make the procedure very expensive and dilatory and cause, as in the present case, the question whether there should be any and what fresh lease to be still undetermined eighteen months after the old lease has expired. The judgment is to be of the tribunal, the county court judge, in a " cause or matter." In these circumstances the appeal is the ordinary appeal from a county court, in which the appellate Court is bound by the findings of fact of the county court judge, unless (1.) there was no evidence to support them, or (2.) the findings are mixed questions of fact and law, such as findings as to "residence" or "possession," which turn upon a correct view of the law on these difficult subjects. A finding as to goodwill, which turns partly on the correct construction of the statute, appears to be a mixed question of fact and law, and a proper subject for appeal. But in my opinion where the appellate Court has decided the proper construction of the Act, and the county court judge has not acted upon that construction, the question of fact on that construction must be remitted to the county court judge.

One fundamental question in this case turned upon the form of the original notice, which was in the alternative, either for compensation or a new lease. Counsel for the landlords before the Referee and county court judge, and, as I understood, before us, argued that the notice being bad, all the proceedings were ultra vires and invalid. The Referee and county court judge did not agree with this contention; the Divisional Court expressed no opinion on it. In my view there is no objection to the notice. Alternative and inconsistent claims are quite common both in the High Court and the county court. In the present case the relations of compensation and the terms of a new lease are peculiarly involved. It will be an answer to a claim for compensation that the tenant has refused the offer of a reasonable lease. To get a new lease the tenant must prove that the amount of compensation he would receive under the Act would be less than his loss of goodwill if he moves his trade to other premises. To require the tenant when he issues his notice to know and state accurately what result should follow from this complication appears to me likely to defeat by technicality the consideration of the matter on the merits. In my opinion there is no objection to the notice as such.

As to other questions of law involved, I am struck by the view apparently taken in the county court, (1.) that a suitable tenant carrying on his trade by ordinary exertions cannot acquire goodwill by merely carrying on his trade in that manner, and (2.) that it is necessary to show special exertions and skill to prove increase of goodwill or of value of the premises as a direct consequence of carrying on the trade. It appears to me that if a suitable tenant has carried on trade at premises for more than five years, and at the end of that period there is a valuable goodwill as proved by the fact that a higher rent can be obtained for the premises than could be obtained when there was no goodwill attaching to the premises, it is not admissible to bring in a number of extraneous circumstances more or less remote to destroy the value of the goodwill which has followed from the indispensable facts of a man's carrying on his trade on the premises and the sequel of his customers continuing to resort to the premises. In my opinion this point was decided in *Llewellyn's* case. (1) One of the points argued there was that the arbitrator was not to allow the tenant claiming the value of the goodwill anything, because part of that value might be due to improved conditions of the neighbourhood, or, in other words, the arbitrator was to deduct from the sum a new tenant would pay so much of that sum as was due to the improved conditions of the neighbourhood. All the members of the Court appear to have negatived this view. The county court judge appears to me to have taken the view that a suitable tenant taking only ordinary exertions in trading cannot show goodwill attached to the premises as a direct result of his carrying on trade at the premises. I think this view is erroneous in law. I can see no warrant in the Act for holding that an ordinary but suitable tenant using ordinary exertions in carrying on his trade cannot attach goodwill to the premises. Once a higher rental value is shown at the end of the tenancy as compared with a low value at its commencement, it appears to me there is no ground in law for saying no goodwill has attached to the premises. During the tenancy it would not in my opinion be possible for an incoming tenant to say, "I will pay you nothing for goodwill, because the possibility of profit is entirely due to extraneous circumstances." I think the Act intended to put the end of the tenancy in the same position. In my opinion the county court judge has not paid sufficient attention to these legal considerations in his findings, and should reconsider them in view of the Court's statement of the law.

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(1) L. R. 10 C. P. 456.

A further matter which in my opinion needs reconsideration is the effect of s. 4, sub-s. 1, proviso (*d*) (ii). It will be noticed that Parliament has used the word "exclusively," and presumably meant something by it. I think it points to the probability of some customers coming to the premises who have never been there before simply because owing to the situation of the premises they pass them; it does not apply to such customers who came there because of circulars or canvassing. I do not think it applies to people who, first coming as strangers because of the situation, continue to come because they like the way the business is carried on. We have not been referred to the evidence on this point, but I should think it is very difficult to prove "exclusive" attribution to situation as an element in increased value, and I should be surprised to hear that there is any evidence to prove such exclusiveness. I think this matter should also be reconsidered by the county court judge.

A number of other points occur to me on the construction of the Act, which seems to me in its working to be rather a damnosa hereditas for both landlord and tenant, but I think it sufficient to deal with the principal points raised, as I understood, in the discussion before us.

It is quite impossible for this Court to express any useful opinion on the amount of compensation or the terms of a reasonable lease. The 700 pages of evidence were not before us. The case must, in my opinion, be remitted to the county court judge to reconsider his judgment on the lines of the legal considerations stated in the judgment of this Court. The tenant must have the costs of the appeal to the Divisional Court and to this Court. The first trial before the county court judge has been rendered abortive by the points argued on behalf of the landlords, and they must pay the costs of the first hearing. The costs of the second hearing will be dealt with by the county court judge. The costs before the Referee will be costs in the cause.

GREER L.J. In this appeal the appellant, the plaintiff in an action in the county court, asks this Court to reverse the judgment of the Divisional Court and of the county court whereby his claim to a new lease of certain premises known as The Avondale Stores of which he was tenant to the respondents, holding a licence for the sale of wine, beer, and spirits, was refused. The Divisional Court decided against the claim on the ground that no goodwill within the meaning of the Landlord and Tenant Act, 1927, can ever be acquired by the tenant of licensed premises. The county court judge took the same view as to the impossibility of a licensed tenant acquiring any such goodwill, but he also held that assuming it was possible for a tenant of such premises to create by his trade a goodwill attached to the premises, the evidence in the present case failed to establish that the plaintiff had in fact, in carrying on his business, attached any goodwill to the licensed premises within the meaning of the statute.

The first ground of decision was a decision of law, being concerned with the meaning of certain provisions of the Landlord and Tenant Act, 1927. The other ground on which the county court judge relied appears at first sight to be a decision on a question of fact, but if, as I think, it turns out on examining the words used by the learned deputy county court judge that his decision was based on an erroneous interpretation of the statute, it may be reviewed by this Court on the ground that the learned judge only arrived at his conclusion of fact by misdirecting himself on the question of law. In my judgment both grounds of the decisions in the Courts below were based on a misconstruction of the statute, and this appeal should be allowed with costs, and the case remitted to the county court judge to reconsider the plaintiff's claim for a new lease in the light of the construction of the statute as declared by this Court.

It is not necessary that I should state the facts of this case in detail. They sufficiently appear in the report of the learned Referee, Mr. S. P. J. Merlin, to whom the plaintiff's action was automatically referred in accordance with the provisions of s. 21, sub-s. 2, of the statute, and Order 20 (*a*) of the County Court Rules. The relevant facts may be quite shortly summarized. In 1910 the lessors of the premises to the then tenant were Messrs. Lacon & Company, the brewers, who held a long lease. They had sub-let to a tenant and taken a mortgage from him for the money advanced to him to pay the premium on the sub-lease. In the hands of this tenant the business of the Stores went from bad to worse, and Messrs. Lacon took possession under their mortgage and let the premises to a series of tenants who were unsuccessful in the carrying on of the business for which the premises were licensed. Thereupon the goodwill, if any, which had formerly attached to the licensed premises had ceased to exist. The premises were, of course, still licensed premises, and probably had a rental value above that which they would have had if unlicensed; an additional value due to the fact that any tenant taking them would have the opportunity of carrying on the business appropriate to the licence, namely, the sale of wine, beer, and spirits, to be consumed off the premises. But in 1910 it would have been impossible for anyone to say that there was any goodwill attached to the house by reason of the business which had been carried on there. There was nothing which an outgoing tenant could sell to an incoming tenant, and there was nothing to which a landlord would succeed if he put an end to the tenancy. The plaintiff, who went into occupation in 1910, was not asked to pay anything, and did not pay anything for goodwill, and for a year or two the business was so unsatisfactory that the landlords consented to go without the modest rent which had been agreed between them and the plaintiff, 52*l*. a year. The plaintiff remained tenant from year to year until 1921. In September of that year the landlords, still Messrs. Lacon & Company, thought it worth their while to secure the plaintiff as tenant for the remainder of the lease which they held as mortgagees in possession, and which they appear to have considered had not become merged in their longer lease. At this time the landlords were in no way restricted from getting the benefit of goodwill on the determination of any tenancy, and accordingly they were in a position to ask the plaintiff to pay something in respect of the additional advantage he was obtaining in getting a long lease of premises in respect of which they might have determined his tenancy by six months' notice. He agreed to take the balance of the old lease at a rent of 90*l.* per annum, and to pay a premium of 300*l.* It is clear that by this time both the landlords and the tenant must have considered there had been in consequence of the business carried on by the plaintiff some goodwill attached to the premises which could be measured by an increase in rental value. The effect of the new arrangement was that the rental paid by the plaintiff was increased by the premium and the rent fixed to an amount which was accepted by the parties as being 133*l.* per annum. While the plaintiff occupied the premises after 1921 under the terms of the old lease the business greatly improved. His term expired by effluxion of time in March, 1932, and unless he was entitled to compensation or a new lease, the landlords would obtain a considerable advantage in the additional letting value of the premises to a new tenant. It was not disputed that for some years the plaintiff was doing a considerable business which justified his being assessed to income tax on an average profit of about 700*l.* per annum.

Before dealing with the construction of the relevant parts of the Landlord and Tenant Act, it will be convenient to refer to some questions of practice that were discussed during the hearing of the appeal. It was contended for the appellant that the learned County Court judge was bound by the findings of fact appearing in the report of the Referee, and that he would be wrong in law if he differed from those findings for any reasons dependent upon the credit to be attached to witnesses whom he had not seen. In my judgment there is nothing in this point. The tribunal appointed by the statute is the county court, unless, under the proviso to s. 21, all persons affected agree that the claim or application should be heard by the High Court. It is only for convenience that the matter is referred in the first instance to a Referee for inquiry and report, but on receiving the report, if the rules of practice have been complied with, the county court is bound to exercise its own judgment on all questions of law or fact, and though it would be in most cases unwise for the county court judge to arrive at a conclusion different from that of the Referee on the question as to the weight to be attached to the evidence of witnesses who have been heard and seen by the Referee and have not been seen or heard by the judge, still it is to the judgment of the latter on all questions of law or fact that the statute refers the action. It was further contended on behalf of the appellant that the appeal from the County Court to the Divisional Court was granted by s. 6 of the County Courts Act, 1919, and was not subject to the limitations of s. 120 of the County Courts Act, 1888. This argument is without weight. The effect of s. 6, sub-s. (1), is not to grant a special right of appeal, but to say that the judgments and orders referred to shall be made by the judge without prejudice to the right of appeal which exists under the County Courts Act, 1888, and it is to be noted that by s. 27 of the County Courts Act, 1919, the Act is to be read as one with the Act of 1888. There is nothing in this point. I am clearly of opinion that no appeal lies to the Divisional Court or to this Court on any questions except those referred to in s. 120 of the Act of 1888.

As I have already stated, I think the learned county court judge's decision was wrong in law. With regard to the first point decided by him, with which the Divisional Court were in agreement, I find it difficult to understand how it can be said that the business of a licensed victualler is not affected by ss. 4 and 5 of the Landlord and Tenant Act, 1927. Sect. 4, sub-s. 1, says : " The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner. . . . be entitled. . . . on quitting the

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holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto." The holdings to which the relevant part of the Act applies are defined in s. 17 as "any premises held under a lease, other than a mining lease, made whether before or after the commencement of this Act, and used wholly or partly for carrying on thereat any trade or business." The sale of intoxicating liquors for consumption off the premises is quite clearly a trade or business, and the Avondale Stores undoubtedly constitute a holding within the meaning of the Act. It seems to me quite impossible to say that because the trade which the tenant did there could not be done without a licence, therefore he was incapable of adding to the value of the licensed premises by acquiring a business there which would enable the landlord to let the premises at a higher rent than it could be let at if no such business had been done on the premises. On the facts of this case it seems to me abundantly clear that the business which was done on the premises by the tenant had very substantially added to its letting value. When the tenant went there it probably had a value above its value as a dwelling-house by reason of the license. This added value at the time was very small, and at the end of the plaintiff's lease the substantial business that was being done there would, without doubt, enable the landlord to let it at a higher figure than if no business or a much less profitable business had been carried on there. It is not easy for lawyers to estimate how much of the business carried on there can rightly be said to attach to the premises, but it is a well known fact that valuers are every day called upon to make an estimate as between outgoing and incoming tenant of the goodwill of licensed premises, and they find no insuperable difficulty in doing so. The statute has expressly refrained from defining goodwill, and has left the Courts to determine what it means. I do not propose to do what other judges have refrained from doing, that is to say, to give a scientific definition of the term "goodwill," but in a general way it is a well understood phrase, and its existence in many cases can be established beyond any reasonable doubt. As Lord Esher, then Brett J. said in *Llewellyn* v. *Rutherford* (1), "In some classes of business, where the trade has long been carried on in a profitable manner in a particular house, and a new tenant comes in and continues to carry on the same business there, it is found by experience that many, if not all, of the customers resort there as before. This is found so regularly to happen, that it has become usual to pay a money value for it, which is commonly called 'goodwill'." And in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.* (2), Lord Macnaghten uses these words: "It was argued that if goodwill be property, it is property having no local situation. It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will—of course under the conditions attaching to property of that nature." And later he says: "What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates." In this case it seems to me indisputable that the plaintiff had proved that by reason of the carrying on by him at the Avondale Stores of the trade

(1) L. R. 10 C. P. 456, 469. (2) [1901] A. C. 217, 223.

of the sale of beer, wines, and spirits, for consumption off the premises for a period of not less than five years, goodwill had become attached to the premises by reason whereof the premises could be let at a higher rent. If this be so, it does not seem to me to be relevant to the question to be determined by the county court judge to point out, as the county court judge did, that there had been no tangible improvement in the value of the goodwill beyond such as might have been expected from the occupancy of a tenant of normal capacity and energy. If a tenant of normal capacity and energy has by the trade he does added to the letting value of the premises, he has thereby created a goodwill which, if he leaves, the landlord can appropriate, and he is just as much entitled to compensation for this goodwill as if he had been a tenant of super-excellence and had thereby made a much larger addition to the rental value, nor does it seem to me to be relevant to inquire whether he had acquired the additional business by reason of a change in the character of the neighbourhood, or by reason of the lapse of some of his competitors in the neighbourhood. What has to be valued is the addition to the rental value which has arisen by reason of his carrying on the business in the circumstances which have in fact happened. There is only one qualification which I think it is necessary to make and that is as to the extent to which it may be adjudged that the increased business has been due to the landlords' relaxation of the tie. The goodwill in that case should, in my judgment, be discounted, because any new tenant, in considering the rent that he would pay for the premises, would attach importance to the fact that for the future the landlord would insist on the tie.

There are only two other points to be considered. First, whether the tenant proved in this case that the sum which he would receive in compensation based on the increased rent to the landlords would not compensate him for the loss he would suffer if he removed and carried on his trade or business in other premises. I think this question is a question of fact on which the county court judge has not given any express finding, but I am inclined to think his view was that if there was a right to compensation, the compensation awarded would not compensate the tenant for the loss he would suffer if he removed to and carried on his trade or business in other premises, but this is a matter he can reconsider when he reconsiders the case, as he must.

No question arises in this appeal with regard to the effect of s. 4, sub-s. 1 (*d*) (ii). By this clause the tribunal is directed to disregard any value which is attributable exclusively to the situation of the premises. It may, however, prove useful if I state my view of the effect of this sub-section. At the end of a lease premises may have a value attributable to the fact that they are licensed premises. They may have a value attributable to the fact that rebus sic stantibus, a goodwill has been created by the tenant, the effect of which is if the premises are re-let in the same condition in which they are at the end of the lease the landlord will get a higher rent than he would otherwise get ; but on the other hand, at the termination of a long lease the site value may have been greatly increased, so that the landlord will be able to let the premises to a tenant on a building lease and thereby obtain an additional rent or premium by reason of a great increase in the site value. I regard clause (*d*) (ii) as a direction to the tribunal that it shall be careful when estimating what the tenant had become entitled to, to exclude this additional rental value due to the increase in site value, as this is in no way attributable to the goodwill created by the tenant. I regard proviso (*c*) and proviso (*d*) (ii) as, strictly speaking, unnecessary, because the result would have been the same if proviso (*a*) had been left without the addition of (*c*) and (*d*) (ii), but it is not uncommon in modern statutes to try and guard against misconceptions by directions to the tribunal which are not strictly required. This is done on the principle e majore cautela.

It was also argued on behalf of the respondents that the learned county court judge was wrong in law in finding that the notice was a valid notice. In my judgment the learned judge was entitled so to find. The tenant none the less claimed in lieu of compensation that he should be given a new lease by reason of the fact that he added to it an alternative claim for compensation, which, inasmuch as he had not quitted the premises, the learned county court judge was not entitled to enquire into, except for the purpose of deciding whether he was entitled to a new lease.

On these grounds I think the appeal should be allowed and the claim remitted to the county court for reconsideration. I agree that the respondents should pay the costs of the appeal from the county court to the Divisional Court, and of the appeal from the Divisional Court to this Court, and of the first hearing in the county court, and the rest of the order as regards costs should be as stated in my Lord's judgment.

EVE J. This appeal involves the question whether the plaintiff, who down to March 25, 1932, was tenant under a lease expiring on that date of a holding within Part I of the Landlord and Tenant Act, 1927, is entitled to be paid compensation for goodwill or in lieu thereof to have a new lease of the holding granted to him. The holding is a messuage, No. 491 Old Kent Road, used as off-licensed premises and known as the Avondale Stores.

The plaintiff first became tenant of the premises under a document of April 1, 1910, whereby Lacon & Company, Ld., as mortgagees in possession, agreed to let, and the plaintiff agreed to take, the premises together with the goodwill of the business carried on thereupon and the fixtures, fittings and trade furniture and utensils belonging thereto for a term of one year and one quarter of another year from March 25, 1910, at the yearly rental of 52*l.*, and the tenant thereby agreed, inter alia, to carry on as at the then present time upon the premises the trade or business of a grocer and in conjunction with such business the trade of an off-licence beer shop for the sale of beer, both in bottles and on draught, wines and spirits for consumption off the premises, and to keep the same open continuously during the hours authorized by law, and use his best endeavours to extend the said trade or business, and not to use the premises for any other purpose, and to deal with the landlords or their successors in business for all beer, ale, porter, stout or other malt liquors sold or consumed upon the premises, or brought thereon to be sold or consumed, and that he would not for a period of five years from the actual determination of the tenancy take, keep, or be in any way concerned in a licensed public house, wine spirit or beer shop, beer house or off-licensed business within half-a-mile of the premises, and that he would not assign, underlet or part with the possession of the said premises or any part thereof or with that agreement without the written consent of the landlords, or, at any time, ask, demand, or receive from any person or persons whomsoever any consideration, sum or sums of money, or gratuity directly or indirectly by way of premium or goodwill for the trade or business carried on or upon the said premises or permit or suffer any other person or persons so to do. The occupancy under this agreement continued down to the year 1921, when the plaintiff, in consideration of a payment to the landlords of 300*l.* became assignee of the premises for the residue of a term of 35 years from March 25, 1897. created by an indenture of lease dated July 13, 1897. At the date of the assignment to the plaintiff Lacon & Co., Ld., were still the landlords, and they so remained until in 1928 they sold the reversion expectant on the determination of the lease to the defendants. The annual rent reserved by the lease of 1897 was 90*l.* The lease contained full covenants to repair and maintain the premises, to preserve and renew the licences, and to conduct the business in a proper and orderly manner, and also covenants not to allow any trade or business except that of a grocer to be exercised or carried on, and in conjunction therewith the trade of an off-licensed beer shop for the sale of beers, either in bottles or on draught, wines and spirits for consumption off the premises, and not to assign, underlet or part with the possession of the premises or any part thereof without the written consent of the lessors, and to deal with the lessors or their successors in business for all beer, ale, porter, stout and other malt liquors, whether brewed by themselves or by any other brewers, which should be sold or consumed upon the premises or should be brought thereon to be sold or consumed. The lease contained no covenant restraining the tenant from carrying on a similar business after its determination.

It was in anticipation of the determination of this lease on March 25, 1932, that the plaintiff, on March 24, 1931, served notice of his claim under the Act of 1927 and after an unsuccessful attempt by the parties to come to an agreement the plaintiff on June 3, 1931, commenced proceedings in the Lambeth County Court claiming a new lease of the premises under s. 5 of the Act on the ground that he was entitled under s. 4 to compensation for the goodwill which had become attached to the premises, but that the sum which could be awarded to him would not compensate him for the loss of goodwill he would suffer if he removed to and carried on his trade in other premises and alternatively 1700*l.* as compensation under s. 4.

By their defence the defendants, without admitting that any goodwill had become attached to the premises by reason of the fact that the plaintiff had for upwards of five years carried on there a trade as a retailer of beer, wine and spirits, alleged that if any goodwill had in fact become attached to the premises so as to add to their letting value the same was wholly attributable to the fact that the premises are licensed premises or to their situation or to these two factors together. They therefore denied that any compensation could be recovered by the plaintiff under s. 4. They further denied that compensation, if recoverable, would not adequately compensate the plaintiff, and submitted that the statutory notice served by the plaintiff was invalid in that it claimed compensation in the alternative to the claim for a new lease and they did not admit that the grant of a new lease would be reasonable. The defence was subsequently amended by adding an allegation that the plaintiff was not a suitable tenant, but this has not been persisted in on this hearing, and in due course the matter was referred pursuant to s. 21, sub-s. 2, to Mr. S. P. J. Merlin, one of the panel of Referees appointed under the Act, for inquiry and report. After a most elaborate and painstaking inquiry, in the course of which numerous witnesses, expert and otherwise, were called and examined, and the history of the premises during the whole period from the date of the lease in 1897 to 1931 was investigated, the learned Referee reported in favour of the plaintiff's claim. He expressed his opinion that the objection to the plaintiff's notice of claim could not be maintained and reported that the plaintiff had undoubtedly carried on a successful business at the premises and had attached to them a valuable goodwill which would enable them to be let at a higher rent than they would have produced had no such goodwill been attached to them. He further expressed the opinion that the plaintiff, if he removed from the premises, would suffer a greater loss than the compensation which could be awarded him under s. 4, and that a grant of a new lease would be reasonable within s. 5, sub-s. 3, subject to the true construction of proviso (*c*) of s. 4, sub-s. 1, of the Act. The report is dated December 8, 1931, and on the following January 22, 1932, the defendants gave notice that at the hearing of the matter by the Court they would apply to the judge to vary the report by the following findings: (1.) That the plaintiff having by his notice claimed compensation for loss of alleged goodwill under s. 4 is precluded from claiming upon the same notice, or at all, a new lease under s. 5; (2.) that it being admitted that the only trade on the premises was a trade in alcoholic refreshments, the plaintiff by reason of s. 4, sub-s. 1, proviso (*c*), was not a person who would have been entitled to compensation within the meaning of s. 5 and is not therefore entitled to claim a new lease; and (3.) further, or in the alternative, that upon the evidence no goodwill was proved other than such as was attributable to the fact that the premises were licensed premises or to the site and the general increase in trade done during the years of the plaintiff's tenancy at off-licensed houses generally; and further, or in the alternative (4 and 5), that upon the evidence it is not reasonable to award a new lease to the plaintiff, and that if it should be right to award a new lease the terms suggested by the Referee are too favourable to the plaintiff.

The respective applications by the plaintiff and defendants to confirm or vary the Report came before the County Court on March 23, 1932, and the learned judge, although he accepted as indisputable the evidence that the goodwill had increased greatly since 1910 came to these conclusions (1.) that the plaintiff had failed to prove that by reason of the carrying on by him of the business since 1910 goodwill had become attached to the premises by reason whereof they would let at a higher rent than they would have realised had no such goodwill attached thereto; (2.) that the plaintiff's statutory notice was not invalid because it contained alternative claims for a new lease and for compensation: and (3.) that the Referee's findings of fact are against the weight of evidence except as to the plaintiff's suitability as a tenant. The learned judge at the request of the parties expressed his opinion on the point arising under proviso (*c*) to s. 4 to the effect that even assuming that the plaintiff had by special exertion, expenditure and skill caused an addition to the value of the goodwill of the business he could not claim compensation in view of the terms of the paragraph referred to. He accordingly varied the report by finding that it has not been proved to the satisfaction of the tribunal that by reason of the carrying on by the plaintiff or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill had become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto; and alternatively, that in the circumstances of this case the provisions of proviso (*c*) to s. 4, sub-s. 1, of the Act debar the plaintiff from the relief which he was seeking. On these findings the application to vary was allowed, and the proceedings and action were dismissed.

In due course an appeal was launched on behalf of the plaintiff on various grounds which fall under two main heads: the first, that the learned judge was wrong in holding that proviso (*c*) debarred the plaintiff from succeeding in the action, and the second, that the learned judge ought to have adopted the learned Referee's findings of fact, in that it was not competent for the learned judge to reject or vary the learned Referee's report on the ground that his view of the weight to be attached to the evidence of the respective witnesses differed from that of the learned Referee. In the Divisional Court the appeal was treated as raising three questions: the first, whether the plaintiff's claim was barred by the form of the notice of claim; the second, whether on the correct construction of proviso (*c*), the plaintiff could in any event be entitled either to a new lease or compensation; and the third, what are the proper functions of the Referee and the county court judge in relation to one another. The Court confined the judgment to the second of the above questions, and having come to the conclusion that proviso (*c*) contemplates premises such as the Avondale Stores, where no other trade than that of the sale of intoxicants is carried on, and where therefore any addition to the value of the premises in relation to the goodwill attaching to them must be directly or indirectly attributable to the fact of the premises being licensed, the Court held that the meaning of the proviso is that the tenant of such premises can obtain neither compensation nor a new lease, and accordingly dismissed the appeal. The present appeal has been brought to get this decision reviewed and the other two questions submitted to the Divisional Court disposed of.

I do not feel able to adopt the construction imposed on proviso (*c*) by the Court below. If the intention was, as they have held it to have been, to exclude the tenant of licensed premises from all right to compensation, one would have expected to find such intention expressed in clear and unequivocal terms, but the language of the paragraph negatives any such construction, in that it presupposes the existence in the case of licensed premises of a sum payable as compensation for goodwill under the section, and is directed to prevent the increase of that sum by the inclusion therein of any increase in the value of the premises due to the fact that they are licensed premises. In cases

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like the present of premises licensed at the commencement and expiry of the holding, no addition to the value of the premises due to the fact that they are licensed premises must be included in fixing the compensation payable. It is perhaps only a reminder that in the case of licensed premises there may be other factors than the carrying on of the business by the tenant that have contributed to the increase in value of the premises, and that these factors, so far as they are attributable to the fact of the premises being licensed, must not be taken into account in fixing the compensation.

Upon the other points left undecided in the Divisional Court, I agree with the judgments already read. I do not think there is any substance in the objection to the plaintiff's notice ; no particular form of notice is prescribed by the Act, and it is impossible to say that the defendants have been embarrassed or left in doubt as to the plaintiff's attitude.

As regards the relative positions of the judge and the Referee, it is well settled that under a reference to inquire and report the Court may adopt or partially adopt or may reject the report as it thinks right. It is the duty of the Referee to set out sufficiently the facts to enable the Court to form a judgment thereon ; if he goes on to state the conclusions at which he has arrived, it is open to the Court to disregard them.

I agree with the other members of the Court in holding that the decision of the learned county court judge is wrong in law, and is therefore a decision which can be reviewed, and I agree with the course they propose to adopt in allowing the appeal and remitting the matter to the learned judge, and also the order they propose as to costs.

*Appeal allowed.*

Solicitors for appellant : *Sprinz & Sons.*

Solicitors for respondents : *Loxley, Gardner & Sewell.*

J. S. H.

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[1933. G. 997.]

*Insurance (Motor Car)—Liability to third party—Validity of conditions limiting liability of insurer—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 35, 36, 38.

The plaintiff made to the defendant and other underwriters a proposal for insurance of a motor-car, and disclosed the fact that he was a garage proprietor. The underwriters issued a policy which provided (inter alia) for indemnity against liability to third persons in respect of bodily injury in the event of accident arising out of the use of the car. The policy also expressly provided that it should not cover liability caused, sustained or incurred while the car was being used otherwise than for "private purposes," which were defined as meaning "social, domestic and pleasure purposes and use by the assured in person in connection with his business or profession. The term 'private purposes.' does not include . . . . use for any purposes in connection with the motor trade." A certificate of insurance under Part II of the Road Traffic Act, 1930, containing a similar limitation was also issued to the plaintiff.

While using the car, as the judge found, for a purpose in connection with the motor trade the plaintiff had an accident, as a result of which a third party claimed damages for personal injuries. The underwriters having refused to indemnify the plaintiff, he claimed a declaration that they were bound to do so.

*Held*, (1.) that there was no inconsistency in the clause defining "private purposes" between the words "use by the assured in person in connection with his business" and the words excluding "use for any purposes in connection with the motor trade," and the fact that the plaintiff had disclosed that he was a garage proprietor did not entitle him to rely on the first part of the clause and ignore the second. The true construction was that the second half took out of the protection of the policy something which, but for it, the first half would have brought in, namely, use by a garage proprietor personally for the purposes of his business.

(2.) That in view of the limitation appearing on the certificate, the issue of the certificate created no estoppel.

(3.) That s. 36 of the Road Traffic Act, 1930, merely defines the cover which a driver must obtain in order to escape the penal consequences of driving without a policy under s. 35. Sect. 38 does not avoid a condition limiting the cover under a policy: it merely prevents an underwriter escaping liability to a third party by reason of some act or omission of the assured after the claim has arisen. The effect of a breach of the conditions in the policy is not to throw on the underwriter a burden which he has never agreed to undertake, but merely to put the assured, so far as the insurance provisions of the Road Traffic Act, 1930, are concerned, in the same position as if he had never taken out a policy at all.

ACTION tried by Branson J. in the Commercial List.

On June 21, 1932, the plaintiff, John Fawcett Gray, signed a proposal for an insurance policy covering the user by him of a Morris motor-car. In that proposal he described himself as a "garage proprietor." On July 2, 1932, a Lloyd's "Red Star" policy, Class A, subscribed by the defendant, Ernest Blackmore, and other underwriters was issued to the plaintiff covering the period from June 21, 1932, to June 21, 1933. By the terms of that policy the proposal was to be deemed to be the basis of the contract and incorporated therewith, and it contained inter alia the following provisions:

"*Liability to Third Parties.*—The underwriters will indemnify the assured . . . . in the event of accident caused by or arising out of the use of the insured car against all sums including claimant's costs and expenses which the assured shall become liable to pay at common law or under Lord Campbell's Act or the Road Traffic Act, 1930, in respect of: Death or bodily injury to any person . . . .

"*General Exceptions of the Policy.*—This policy does not cover: Any accident, injury, loss, damage and/or liability caused, sustained or incurred whilst any motor-car in respect of or in connection with which insurance and/or indemnity is granted under this policy is—(*a*) Being used otherwise than for private purposes as hereinafter defined; (*b*) Being used whilst drawing a trailer except the towing (other than for reward) of one disabled mechanically propelled vehicle . . . .

"*Definition of 'Private Purposes.'*—For the purposes of this policy the term 'private purposes' means social, domestic and pleasure purposes and use by the assured in person in connection with his business or profession. The term 'private purposes' does not include use for hiring, commercial travelling, racing, pacemaking, reliability trial or speed testing, the carriage of goods or samples in connection with any trade or business, or use for any purposes in connection with the motor trade."

This was the usual form of a "Class A" policy, other classes of policies covering user of the car for business purposes being available at higher premiums.

A certificate of insurance stated on its face to be "issued in accordance with the provisions of Part II of the Road Traffic Act, 1930," (1) was also issued to the plaintiff containing the following clause:

"*Limitations as to use.*—'Private purposes,' which means use for social, domestic and pleasure purposes, and use by the policy-holder in person in connection with his business or profession. The policy does not cover use for hiring, racing, pace-making, reliability trial or speed-testing, commercial travelling, the carriage of goods or samples in connection with any trade or business or use for any purpose in connection with the motor trade." The certificate contained no specific reference to the towing of other vehicles.

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(1) Part II of the Road Traffic Act, 1930 (20 & 21 Geo. 5,. c. 43), s. 35, sub-s. 1: Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act.

Sect. 36, sub-s. 1: In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which . . . . (*b*) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road.

Sub-s. 5: A policy shall be of no effect for the purposes of this Part of this Act unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Part of this Act referred to as a "certificate of insurance") in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed.

Sect. 38: Any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in paragraph (*b*) of sub-s. (1) of s. 36.

On November 16, 1932, a friend and customer of the plaintiff telephoned to him, asking him to go to Charles Street, Mayfair, where his (the friend's) brother's Buick car had broken down. When the plaintiff reached Charles Street in the Morris car he found that the Buick car could not be repaired on the spot, and he decided to tow it round the corner, not in fact for reward (though he would be paid for repairing the car), but because he was afraid that the police would object if he left it where it was. As he began to tow it he heard a shout and found that a man named Hamilton had been knocked down by the Buick car. Mr. Hamilton brought an action for damages against the plaintiff, who sought to protect himself under his policy. The underwriters repudiated liability on the ground that the Morris car was being used for other than private purposes, namely, the towing of a car for reward, or, alternatively, for a purpose in connection with the motor trade. The plaintiff then began this action against the defendant as a representative underwriter, claiming declarations that the policy was valid and that the defendant was liable to indemnify the plaintiff thereunder to the extent to which he had subscribed the policy.

*Beyfus K.C.* and *Manningham-Buller* for the plaintiff. It is submitted, first, that the policy on its true construction covers the plaintiff's liability for damage resulting from such an accident as occurred in this case; and secondly that whether or not the policy covers the plaintiff's liability in express terms, it covers that liability by operation of the Road Traffic Act, 1930, s. 36, sub-s. 1 (*b*), and s. 38.

First, with regard to the construction of the policy. It is a " Red Star " Lloyd's policy in the usual form, and it was issued pursuant to a proposal form submitted by the plaintiff, in which all the required particulars had been inserted. The insurers then delivered to him a certificate in the form prescribed by the Motor Vehicles (Third Party Risks) Regulations, 1930 (S. R. & O. 1930, No. 1097), para. 4 and

Sch. A. On production of that certificate the Middlesex County Council granted to the plaintiff a road licence. The defendant now seeks to escape liability on the grounds (1.) that the plaintiff in filling up the proposal form stated and represented that he would use the car for private purposes only, and that the policy was issued on that representation; (2.) that the plaintiff, in disregard of the condition as to user for private purposes on which the policy was issued, was using it at the time of the accident for business purposes; (3.) that the plaintiff at that time was towing another vehicle for hire, and (4.) that the plaintiff failed at any time to disclose to the defendant that the car would be used for business purposes. None of these objections is valid. The expression "private purposes," as used by the plaintiff in the proposal form, merely meant the plaintiff's own purposes, whether business or personal, as distinct, for example, from use as a public service vehicle. It is not possible to impute to him knowledge at that time of the limited meaning sought to be put on "private purposes" by the definition clause. The plaintiff disclosed in the proposal form that he was a garage proprietor, and the defendant cannot therefore have supposed that the car would not be used for business purposes, and, if for business purposes, for purposes connected with the motor trade. The definition of "private purposes" in the policy is ambiguous or inconsistent, in that it first of all includes use by the assured in person in connection with his business, and then excludes use for any purposes in connection with the motor trade. The position of an assured whose business is connected with the motor trade is left uncertain and the policy should therefore be construed against the insurer who puts it forward.

The defendant, moreover, having issued to the plaintiff a certificate under Part II of the Road Traffic Act, 1930, is estopped from denying that the plaintiff is insured against any liability which that Part of the Act requires him to be insured against. Further, by s. 38, in Part II of the Act, "any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in s. 36, sub-s. 1 (*b*)." It is submitted that the Court should disregard the comma which appears after the word "cease" in the King's Printer's copy, and should construe the section as meaning "Any condition in a policy providing (*a*) that no liability shall arise under the policy or (*b*) that any liability so arising shall cease in the event, etc., shall be of no effect. The condition that no liability shall arise if the car is used otherwise than for private purposes would then be of no effect, and the plaintiff would be entitled to recover.

*Schiller K.C.* and *Philip Vos* for the defendant. There is really no case for the defendant to answer. The claim is not within the policy for two reasons: (1.) the plaintiff was using the car for purposes in connection with the motor trade and was therefore excluded by the definition clause. That clause is perfectly consistent; its effect is to permit the assured in person to use the car for the purposes of his business, provided that that business is not one connected with the motor trade. Here, as was clear from the proposal form, the plaintiff's business was connected with the motor trade. He chose to pay the premium appropriate to the limited cover of a "Class A" policy and cannot be heard to claim the more extensive cover available at higher premiums. (2.) Since the plaintiff was employed for reward to repair the Buick car the towing of it must be regarded as a part of that work for reward, even though no specific charge was made for the towing. On that ground also this accident was not covered.

The contention that the Road Traffic Act, 1930, has revolutionized the law is without foundation. A policy of insurance still only covers the risks mentioned in it: if those risks are not wide enough to cover the liabilities mentioned in s. 36 of the Road Traffic Act, the result is that the assured may be committing an offence, not that the underwriter is under liabilities which he has expressly refused to undertake.

Similarly, there can be no question of estoppel by the certificate, since it stated on its face the limitations to which it was subject.

*Manningham-Buller* in reply.

BRANSON J. This is a case in which the plaintiff sues for a declaration that he is entitled to be indemnified under a certain policy of insurance subscribed by the defendant against a claim that is being made against him by one Ronald Hamilton, who alleges that he has suffered damage by reason of the negligent use by the plaintiff of a certain motor-car. The defence is, that, whereas the policy is admitted, the car was at the time of the accident being used by the plaintiff in such a way that it was not covered by the policy at all, and therefore, whether the plaintiff be liable to Mr. Hamilton or not, the defendant has no interest in the matter whatever.

The decision depends in the first instance upon the question of fact, that is, whether, taking the terms of the policy as they appear therein, the plaintiff was covered in respect of the car at the time when the accident happened. The defendant alleges that he was not. A second question arises, if the fact is so found, namely, whether, in spite of the term of the policy on which the defendant relies as showing that this car was not being used within the policy—in other words, that he was not on risk at the time—the effect of the Road Traffic Act, 1930, is so to vary the rights of the plaintiff and the defendant as to make the plaintiff entitled to indemnity in respect of this accident.

I think the first matter to consider is the policy as it stands. The policy was issued in pursuance of a proposal form. In that form, the plaintiff described himself as a garage-proprietor; but his proposal for insurance was for the insurance of a "Morris-Oxford" car under Class A.

Class A is a class which covers only private cars, and the plaintiff was aware, when he applied for a policy of that class, that if he asked for one of the other classes, in which cars may be used for business purposes, he would have to pay a higher premium.

His proposal was accepted and a policy was issued in respect of it. The material part of the policy is to be found in the clause headed "General Exceptions," and that reads as follows: "This policy does not cover any accident, injury, loss, damage, and/or liability caused, sustained or incurred whilst any motor-car in respect of or in connection with which insurance and/or indemnity is granted under this policy is—(1.) Being used otherwise than for private purposes as hereinafter defined . . . ." A few lines further down, under a large printed heading, "definition of 'private purposes,'" the following clause appears: "For the purposes of this policy the term 'private purposes' means social, domestic and pleasure purposes and use by the assured in person in connection with his business or profession. The term 'private purposes' does not include use for hiring, commercial travelling, racing, pace-making, reliability trial or speed-testing, the carriage of goods or samples in connection with any trade or business, or use for any purposes in connection with the motor trade." So that the policy does not cover the car whilst being used otherwise than for private purposes as so defined; and if in the present case it was being used for any purpose in connection with the motor trade, then, upon the plain terms of the policy, the policy did not cover the car at the time.

An attempt has been made to say that the two branches of that clause are mutually inconsistent and that the policy having been issued in pursuance of the proposal form of a garage proprietor it must be read as though the second sentence of the clause was deleted and as allowing the assured to use the car in connection with his business. I cannot so treat the clause. In order to ascertain what is the definition of "private purposes," it is necessary to read the whole

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definition, and the definition contains two branches, one of which includes something which prima facie would not come under the heading "private purposes" and the second of which excludes something which that first branch has brought in. It is impossible to treat them as mutually inconsistent. One must read the whole clause together and come to a conclusion upon it. If that is done, there is no difficulty at all. If the assured is one whose business is the motor trade, the second branch of the clause prevents the first branch from allowing him to use the car for the purpose of his business. In my opinion, therefore, it is quite clear that, upon the policy as it stands, if this car was being used for any purpose in connection with the motor trade, the policy did not cover it.

In pursuance of that policy, the defendant issued a certificate of insurance under the Road Traffic Act, 1930, and that certificate is in the prescribed form, and that certificate contains upon the face of it, under the heading "Limitations as to use," this other provision that the policy does not cover the use of the car for any purpose in connection with the motor trade. In view of that express statement upon the face of the certificate of insurance, I cannot think there can be anything in the next point taken upon this policy, to wit, a point that some estoppel arises to prevent the defendant from relying upon that limitation as against the assured. The suggestion is that, because at the foot of the certificate of insurance there is a certificate that the policy is issued in accordance with the provisions of the Road Traffic Act, 1930, and because it is contended that the policy is not in accordance with the provisions of the Road Traffic Act if it contains any limitations as to user of the car at all, therefore the defendant is in some way estopped from saying that the limitation has an operation as against the plaintiff. I cannot see how any estoppel can begin to arise in the matter, and I say no more about that point. That being so as to the position upon the policy as it stands, the question of fact arises, was this car being used for any purpose

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connected with the motor trade when the accident happened? If it was, then, unless help can be obtained for the plaintiff from the Road Traffic Act, his claim in this action must fail.

[His Lordship then discussed the question of fact, and found that at the time when the accident happened, the Morris car was being used by the plaintiff for a purpose in connection with the motor trade.]

Therefore, unless something contained in the Road Traffic Act, 1930, has altered the rights of the parties under the policy, the words of the policy under which it is stated not to cover any accident or liability sustained while the car is being used otherwise than for private purposes, as hereinafter defined, prevent the plaintiff from recovering the declaration which he seeks. The only question left then is whether there is anything in the Road Traffic Act, 1930, which does so alter the rights of the parties as defined by the policy. I am afraid that there is not a great deal of help to be got out of the cases which have already been decided under the Road Traffic Act, 1930, because in none of them was the precise point with which I have to deal raised for decision. (1) I propose, therefore, to turn first of all to the statute and to see what the statute says. The Act is one to make provision, amongst other things, for the protection of third parties against accidents arising out of the use of motor vehicles. That part of its object is dealt with in Part II of the Act.

It seems to me that the best way of trying to understand the provisions of the Act is to look at the series of sections, beginning with s. 35, the first section of Part II. [His Lordship read the section.] If a person acts in contravention of that section he is made liable to fine or imprisonment or both. So there is an enactment prohibiting the use of the vehicle upon the road unless the person using it is covered against third-party risks in respect of that user of the vehicle. Then, s. 36 provides what the policy must contain if it is to comply with the provisions of the Act, that is, what cover a man who is using a motor vehicle upon a road must have if he is to escape the consequences of s. 35; and, in order to do so, he has to have a policy of insurance which is issued by an authorized person and which insures him in respect of any liability which may be incurred by him in respect of death or bodily injury caused by or arising out of the use of the vehicle on the road. That, it seems to me, is simply prescribing what cover the man must have if he is to escape the consequences of s. 35. Sect. 35 relates to the use by him of a motor-car upon the road, and it is that use by him of that vehicle on the road that must be covered in order to free him from liability under s. 35. All that s. 36 does is to prescribe the kind of cover that he must have in order to escape the consequences of using the vehicle in contravention of s. 35.

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(1) *Reporter's Note. Bright* v. *Ashfold* [1932] 2 K. B. 153, which raised the same point in a criminal case which came before the Divisional Court on a case stated, was not cited in the present case.

What is sought in this case is a construction of the section which should say that any policy issued in respect of any vehicle which may be used on the road must cover that vehicle whenever used on the road for any purpose for which any vehicle can be used on the road. I do not see that the statute says anything of the sort. It is defining the protection which a man must have if he is to escape the consequences of s. 35. That that is so, appears from the provisions of s. 36 itself. It is obvious from s. 36, sub-s. 5, relating to the certificate of insurance, that the policy may contain conditions the nature of which is left completely open. So it clearly contemplates that the policy may be issued subject to certain conditions, and unless they are to be conditions limiting the liability of the underwriter what possible reason can there be for their inclusion in the certificate, the object of which is to make clear to whom it may concern the conditions, if any, subject to which the policy has been issued. Sect. 37 deals with securities and has no reference to the question I have to decide. Then comes s. 38, which is relied upon by the plaintiff in this case as doing away with the provision of the policy under which it is agreed that the policy shall not cover the car when it is being used otherwise

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than for private purposes. [His Lordship read the section.] The argument is that a provision in the policy that the car shall not be covered if it is being used for a certain purpose is rendered of no effect by this clause. It is said that the clause must be read without a comma in it and, as I understand it, in the following way: "Any condition (*a*) that no liability shall arise or (*b*) that any liability so arising shall cease in the event, etc., shall be of no effect." Now, it seems to me that that is an impossible construction to put upon this clause, whether you put a comma after "cease" or not. The section seems to me to be perfectly clearly expressed as it stands and to provide that any condition in the policy providing that no liability shall arise under it in the event of some specified thing being done or omitted to be done after the event giving rise to a claim under the policy, shall be of no effect; in other words, the words "in the event of some specified thing being done, etc.," apply equally to the words "that no liability shall arise . . . ." as they do to the words "that any liability so arising shall cease." I think the matter may be tested by leaving out one of the suggested alternatives, and dealing with the other by itself. So treated, the section, according to the plaintiff's argument, would read, "Any condition providing that no liability shall arise under the policy shall be of no effect," which is obviously a provision which the statute never meant to enact; and the attempt to break up the words of the section as suggested by the plaintiff leads to what seems to me to be a nonsensical provision in the statute. It is said that there is no logical difference between the enactment which Parliament obviously intended, that the failure to observe conditions as to something to be done or omitted to be done after the happening of an accident should not be allowed to affect the underwriter's liability in cases of third-party claims, and an enactment that, no matter what the parties agreed in the policy, if the car did an injury to a third party the underwriter should have to pay; but it seems to me that there is all the difference in the world between the two positions. A man may agree to have certain cover, and he goes forth upon the road covered according to that agreement; before an accident happens, what offence has he committed? He has got a policy which for all that he has hitherto done covers him, and he is saved from s. 35; and yet if the policy contains conditions as to something which he must do after an accident has happened or something which he must not do after an accident has happened, a failure on his part in that respect may enable the underwriter who was on risk at the time when the accident happened to escape, and one can well understand the Legislature saying that that shall not be permitted.

If all was in order between the assured and the underwriter when the accident happened, the position cannot be altered by subsequent breaches or by acts or omissions on the part of the assured so as to make him less able to compensate the person who has been injured. But it would be an entirely different matter for the legislature to go back to a time before the accident had happened and to say that, if any one chooses to underwrite a policy in connection with a motor-car, no limitations as to the time during which, or as to the persons by whom, or as to the manner in which, that vehicle can be used can have any avail to save the underwriter from liability. If that were the state of the law, it would mean that there could be no such policies as are issued at present—policies, for example, where a man insures two or three cars, warranting that only one of them shall be in use at a time, and thereby gets a reduction of premium. No underwriter would underwrite such a policy if it could be said, ex post facto, that that condition, being broken, could not be relied upon, and that he might be liable for the damage done by three cars out at one time, although he had only insured one; and similarly one might imagine any number of ridiculous positions which would arise. I see nothing in the statute which prevents an underwriter and an assured from agreeing to a policy with any conditions that they choose; but if the assured takes the car upon the road in breach of those conditions he cannot

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thereby throw a greater obligation upon the underwriter. All that happens is that he is on the road without a policy which is covering him under the Road Traffic Act, and he is liable under s. 35 as though he had never taken out a policy at all. He is using a car which is not covered by a policy which insures him under the words of s. 36, sub-s. 1 (*b*). That is the result of it, not to put an extra burden upon people who have never agreed to undertake it.

In my view, therefore, upon the plain words of the statute, this action is misconceived; having come to the conclusion upon the facts that the car was being used for a purpose which was excepted from the policy, I hold that it was not covered by the policy at all at the time in question; and I see nothing in the Road Traffic Act which enables the assured, the plaintiff, to say, "Notwithstanding that I was using this car in the way in which the policy says, not that I was not to use it, but that I could not use it and retain my cover, you are still liable to pay me under the policy."

For those reasons, I have come to the conclusion that this action fails and must be dismissed with costs.

*Judgment for defendant.*

Solicitors for plaintiff: *Emanuel, Round & Nathan.*
Solicitor for defendant: *William Charles Crocker.*

J. W. H.

## ELLIOTT (INSPECTOR OF TAXES) v. BURN.

K. B. D.
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*Jan.* 31.

C. A.
*July* 6, 7.

*Revenue—Income Tax—Profit "not before enumerated" arising from land—Land taxed under Sch. A—Yearly payment to owners under agreement giving right to let down surface for mining—Claim for additional Tax under r. 7 of No. II. of Sch. A—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, c. 40), *Sch. A, No. II., r.* 7.

Payments made to a surface owner of land by mineral owners for licence to let down the surface, even if annual and described as rent, are not profits arising from the land within the meaning of the Income Tax Acts.

The appellant tax-payers were surface owners of certain lands the minerals under which belonged to and were worked by J. B. & Partners. The surface was let to a farmer at a rack-rent and the appellants were taxed in respect of it under Sch. A of the Income Tax Act. By an agreement made in 1922 the appellants granted to J. B. & Partners the right in working the mines to withdraw from the lands any support in consideration of a yearly payment to the appellants of 150*l.* and also a royalty of 1½*d.* for every ton of coal worked by them under the lands. The Crown claimed that the sums received each year under the agreement were within r. 7 of No. II. of Sch. A as "other profits not before enumerated" arising from lands and liable to tax in addition to Sch. A assessment:—

*Held,* by Finlay J., that if anything of value, whether an incorporeal hereditament or not, which could be differentiated from ordinary rent, arose out of the land as an incident of ownership, that was within r. 7 of No. II. of Sch. II. and was assessable to tax in addition to the ordinary tax under Sch. A.

*Held,* by the Court of Appeal (reversing the decision of Finlay J.), that the money received under the agreement did not fall within even the widest interpretation of Sch. A or its rules, as the agreement was apart from any user of the land and apart from any profit arising from the land: the right to support of the surface accrued only when the injury to the surface occurred, and such a right did not arise out of any using of the land but by reason of the mususer of the mines which let down the surface.

CASE stated by the General Commissioners for Chester Ward Division in the County of Durham under the Income Tax Act, 1918, s. 149.

At a meeting of the General Commissioners for the Division of Chester Ward held at the Town Hall, Gateshead, on October 6, 1931, J. H. and F. H. Burn, of 32 Mosley Street, Newcastle-upon-Tyne (hereinafter referred to as "the respondents"), appealed against certain assessments made upon them under Sch. D of the Income Tax Acts for the years shown below and alternatively under Sch. A for the

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years 1924–25, 1925–26 and 1926–27, in respect of certain payments made to them under the circumstances hereinafter set out.

The assessments against which the respondents appealed were as follows :—

| | | |
|---|---|---|
| For the year ending April 5, | 1924 . . . | 75*l.* |
| ,, ,, ,, | 1925 . . . | 155*l.* |
| ,, ,, ,, | 1926 . . . | 432*l.* |
| ,, ,, ,, | 1927 . . . | 526*l.* |
| ,, ,, ,, | 1928 . . . | 778*l.* |
| ,, ,, ,, | 1929 . . . | 288*l.* 10*s.* |
| ,, ,, ,, | 1930 . . . | 694*l.* |

The following facts were admitted or proved :—

(*a*) The respondents were the surface owners of certain lands at North Follonsby in the county of Durham. The minerals under the said lands belonged to and were worked by John Bowes & Partners, Ld., colliery owners.

(*b*) By an agreement dated December 19, 1906, and made between the respondents of the one part and John Bowes & Partners, Ld., of the other part, the respondents granted to John Bowes & Partners, Ld., the surface liberties required in the working of the coal subject to the conditions set out in that agreement.

(*c*) By a further agreement dated December 21, 1922, and made between the same parties, the respondents (therein referred to as " the lessors ") granted to the said John Bowes & Partners, Ld. (therein referred to as " the lessees "), by clause 5 thereof " full liberty in working any mines or seams of coal which the lessees may for the time being be entitled to work under the said lands of the lessors at North Follonsby aforesaid (which lands are hereinafter referred to as ' the said lands hereinbefore described ') to withdraw from the said lands hereinbefore described or any part thereof any support for such lands whether vertical or lateral but subject as to such parts of the said lands hereinbefore described or any other lands as may be affected thereby or subject thereto to the provisions of the Railway Clauses Consolidation Act 1845 and it is expressly declared that nothing in these presents shall be deemed to authorise the lessees to cause any damage or injury to any lands adjacent to any of the said lands hereinbefore described or any buildings railways works or erections on such adjacent lands whether belonging to the lessors or to any other person."

The consideration for the said grant as set out in clauses 7 and 8 of the said agreement was as follows :—

Clause 7 : " Yielding and paying therefor the yearly certain rent of 150*l.* and so in proportion for any less period than a year."

Clause 9 : " And also yielding and paying the rent of 1½*d.* for every ton of coal worked by the lessees from underneath the said lands hereinbefore described." These payments were the subject of the assessments in dispute.

It was also agreed by clauses 14, 15, 16 and 17 of the said agreement that any actual damage caused to crops, drains, pipes or other injury to the said lands referred to or to any buildings thereon should be compensated for in addition to the payment of the said certain and tonnage rents referred to in clauses 7 and 8 of the agreement. Also by clause 18 the respondents were indemnified against claims by third parties in respect of damage to adjoining lands. No such payments for actual damage were however included in the assessments under appeal.

Up to the date of the hearing of the appeal no sums had been expended by the respondents in restoring the damage to lands caused by the colliery workings.

(*d*) The amounts paid on certain rent or tonnage under clauses 7 and 8 of the said agreement and received by the respondents were :—

| | | | | |
|---|---|---|---|---|
| For the year | ended | April 5, | 1923 | 75*l.* |
| ,, | ,, | ,, | 1924 | 155*l.* |
| ,, | ,, | ,, | 1925 | 432*l.* |
| ,, | ,, | ,, | 1926 | 526*l.* |
| ,, | ,, | ,, | 1927 | 778*l.* |
| ,, | ,, | ,, | 1928 | 288*l.* 16*s.* |
| ,, | ,, | ,, | 1929 | 694*l.* |

The amounts had been paid to the respondents in full without deducting income tax.

The surface of the said land was let by the respondents and was in the occupation of a farmer at an annual rack-rent of 296*l*., and this was taxed under Sch. A accordingly.

It was contended on behalf of the respondents (inter alia): (1.) that the respondents were not in occupation of the said land; (2.) that if the said rents were profits arising from lands they were profits liable to deduction and not chargeable on the owner thereof; (3.) that income tax had already been charged under Sch. A of the Income Tax Act, 1918, on the full annual value of the said land and no further charge could be made under Sch. A in respect of the said land; (4.) that the said rents were not annual profits or gains in respect of any trade, profession, employment or vocation carried on by the respondents; (5.) that if the said rents were not profits arising from lands they were annual payments made by virtue of a contract—namely, the agreement dated December 21, 1922; (6.) that the assessments should be discharged.

[*Fry* v. *Salisbury House Estate, Ld.* (1), was referred to.]

Counsel on behalf of the respondents agreed that the payments in question should be treated as payments of income and not capital.

It was contended by the Inspector of Taxes (inter alia): (1.) that the payments in question were profits or gains chargeable to income tax under the Income Tax Acts; (2.) that the payments in question were not a distribution of profits to the owner of the soil or property from which the colliery owner was entitled to deduct income tax under r. 5 of No. III. of Sch. A; (3.) that the payments in question were not part of the annual value of the land assessed under No. I. of Sch. A; (4.) that the payments in question were assessable either under r. 7 of No. II. of Sch. A or under Case III. or Case VI. of Sch. D.

Having considered the evidence and arguments adduced before them the General Commissioners held that the said rents were not liable to assessment under r. 7 of No. II., Sch. A, or Case III. or Case VI. of Sch. D, and that the third contention submitted on behalf of the respondents was correct. Accordingly they allowed the appeal and discharged the assessments. The appellant upon the determination of the appeal declared his dissatisfaction therewith as being erroneous in point of law, and required a case to be stated for the opinion of the High Court under the Income Tax Act, 1918, s. 149.

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(1) [1930] A. C. 432.

*Sir Thomas Inskip A.-G.* and *R. P. Hills* for the appellant. The sums received as rents under the agreements are profits or gains chargeable to income tax under r. 7 of No. II. of Sch. A. These are profits " not before enumerated " arising from lands " not being in the actual possession or occupation " of the respondents, who are the persons to be charged; *Fry* v. *Salisbury House Estate, Ld.* (1), does not apply to the present case, the facts being very different. We rely on *Hill* v. *Gregory* (2) as showing that where rent is received for the right to work coal, the lessors not being in occupation and the seams not being worked, the lessors are properly assessed on the rents under the corresponding rule of No. II. of Sch. A of the Income Tax Act, 1842. This is a profit arising from land the surface of which is owned by the respondents. They chose to turn it to account by the grant of a lease for annual payments and they are liable to tax under r. 7. Had the payments not been upon property in land they would fall under Sch. D, but they here fall under No. II. of Sch. A. The respondents have divided their property into two income-bearing sources: (*a*) the land in occupation, (*b*) receipts which are in the nature of tolls. As long as these remain in their hands they represent an incident of property. Any further income that the lessors create out of the property falls under No. II. of Sch. A.

[They referred also to *Inland Revenue Commissioners* v. *Forth Conservancy Board* (3) and *Forth Conservancy Board* v. *Inland Revenue Commissioners*. (4)]

(1) [1930] A. C. 432.
(2) [1912] 2 K. B. 61.
(3) [1929] A. C. 213.
(4) [1931] A. C. 540.

*Latter K.C.* and *J. Charlesworth* for the respondents. Income tax has already been charged under Sch. A for the full annual value and no further charge can be made. Any assessment under Sch. A must show what lands are the subject of the assessment. They cannot fall under two headings. There are no dealings with the land here to justify the assessment, whether in the nature of farming or otherwise.

*Hill* v. *Gregory* (1) is clearly distinguishable, because there the lands in respect of which the assessment was made were separate lands and the rents in respect of them had not been taxed under Sch. A. No. II. of Sch. A refers entirely to hereditaments, some of which are incorporeal. It is only where there is a hereditament separate from that which has already been taxed under Sch. A that No. II. applies.

*Fry* v. *Salisbury House Estate, Ld.* (2), shows that when the full tax has been levied there can be no further tax under Sch. D, where the amounts received as rents exceed the annual value. These rents are not "profits and gains," and ought not to be so treated.

*R. P. Hills* in reply. These payments resemble annual payments for a copyright licence and are profits and gains not covered by the ordinary Sch. A payment. They fall clearly under r. 7 of No. II. of Sch. A.

FINLAY J. [after stating the facts, continued :] In these circumstances the question arises, and it is not free from difficulty, whether the Crown can charge under this r. 7. Rule 7 is contained in No. II. of Sch. A, and the heading to No. II. is as follows : "Rules for estimating the annual value of certain Lands, Tenements, Hereditaments or Heritages which are not to be charged according to the preceding General Rule, and for determining the person chargeable." Rules 1 to 6 deal with certain matters : tithes ; dues in right of the church or by endowment ; manors and other royalties and other dues and services of that sort ; fines received in consideration of any demise of lands or tenements. Then we come to r. 7 :

(1) [1912] 2 K. B. 61.

(2) [1930] A. C. 432.

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"In the case of all other profits not before enumerated (other than profits liable to deduction in pursuance of rules 1 and 4 of No. VIII. of this Schedule) arising from lands, tenements, hereditaments or heritages not being in the actual possession or occupation of the person to be charged, the annual value shall be understood to be the average amount for one year of the profits of the number of years which, on the statement of the person to be charged, appears to the commissioners to be fair and equitable. Tax shall be assessed and charged on the receivers of such profits or on the persons entitled thereto." The respondents, being the owners of the surface, had let the surface to a farmer, and the farmer paid in respect of that letting what is admitted to be a rack-rent for the lease of the surface of the land. Income tax was charged in the ordinary course on the occupier and then deducted by him from his rent, and that income tax, under the general rule of Sch. A, was thus charged upon the respondents and charged on the annual value—namely, the amount of the annual rent. These lands were let at a rack-rent, and therefore, what one may call the ordinary Sch. A assessment, as distinguished from the special matters to be dealt with under No. II. and under No. III., was admittedly and correctly made, and made on the proper annual value, measured by the rack-rent.

The Crown say that this is exactly within the words of r. 7, that here there is a profit "not before enumerated"; that is, a profit arising from lands, tenements, hereditaments or heritages not being in the actual possession or occupation of the person to be charged, and they therefore say that they bring themselves exactly within the terms of the rule. There is no doubt at all that the Crown must bring themselves within the terms of the rule. In this case there is no apparent reason why tax could not be levied on these sums. They were annual sums, accruing year by year to the respondents, by reason of the circumstances that they had got something which they were in a position to turn to advantage. There is no reason why they should not pay tax on this just as much as on any other source of income that comes to them; but I

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entirely assent to the view that the Crown must bring the subject within the actual words of some charging section imposing taxation. That is well illustrated by the two cases of the *Forth Conservancy Board.* (1) The first case arose in this way: the Crown sought to impose a tax in respect of income derived by the Commissioners from dues paid by vessels using the Firth of Forth or part of the Firth of Forth, and they sought to levy that tax under Sch. A. It was held that that failed, because, though these dues were income, they were not income arising out of the land, and therefore there was no taxation under Sch. A. Thereupon the Crown (in the second case) said that the sums received in respect of these dues were a proper subject-matter of assessment under Sch. D; and on that occasion the Crown succeeded, because not only had they shown that there there was income, but that there was income which was caught by the Schedule which, in the second case, they were alleging was the appropriate Schedule. As I have said, it looks as if this, being income, was caught by the exact words of r. 7. But Mr. Latter urged upon me an argument that requires careful attention. The substance of what he said was this: " If you look at this Rule No. II. you will see that these are all in themselves properties; they are lands, tenements, hereditaments or heritages; the title shows it; and the various tithes, dues and so on are all hereditaments. It may well be that some of them, at all events, are incorporeal hereditaments, but hereditaments they are, and in order that there may be further taxation levied under Sch. A, in addition to the ordinary Sch. A taxation" (as I called it earlier) " there must be some other property which attracts the tax." His argument was: " That will not do: you must have some separate property and then, and then only, can you get additional taxation under Sch. A." That argument suggests a reference to the *Salisbury House* case. (2) I am not going into that case again, but, in substance, what was there decided was that the full measure of taxation having been levied in respect of the annual value, there could not be a further tax under Sch. D in respect of the amount by which the rents received exceeded the annual value. The Sch. A tax is not a tax on rents, as it has been put by more than one great authority in that very case. It may be, as Mr. Hills suggested, that some further consideration may need to be given to the precise bearing of that statement, which is certainly true, because it was made by more than one of the Lords; but, however that may be, the actual decision in the *Salisbury House* case (1) amounts really only to this, that when the full tax on the annual value has been imposed there cannot be a tax under Sch. D by reason of the circumstance that, for one reason or another (and it does not seem to matter what the reason is), the rents received exceed the annual value as measured for the purposes of Sch. A. That case was naturally referred to before the Commissioners and before me, but it does not seem to me to have any direct bearing upon the problem that I have to consider. Nearer the present case, though I think successfully distinguished by Mr. Latter, is *Hill* v. *Gregory*. (2) That shows quite clearly that the sum received in respect of a right to work minerals which nobody was working and of which no one was in occupation was taxable under this very rule in the hands of the recipient. The whole question is whether it is a distinction which makes the difference. Mr. Latter rightly pointed out that there there was undoubtedly the other property; there were the actual minerals there, and therefore he said that that case did not really govern the present case. I agree that there was that distinction, but, nevertheless, I think that great weight attaches to a passage in the judgment of that great authority Hamilton J., as he then was. It is true that he was dealing with the case before him, and was not anticipating the questions which have developed in such cases as the *Salisbury House* case (1), but, none the less, his words do appear to me to afford direct support for the argument of the Crown here. In this passage the learned judge was dealing with the argument of the Crown; he also stated the argument of the appellant, and he, in substance, accepted the argument of the Crown. I think that the great authority of Hamilton J. must be considered to lie within this passage: "It is said that those general words, the object of which is to bring within the ambit of case No. II. everything that may be differentiated from rent in the ordinary sense of the term, and yet is a profit arising from land, varying in amount according to changing circumstances and at the same time arising from the land and not from some business carried on upon the land, are exactly appropriate to include this particular case." Here it seems to me that what Hamilton J. there said is really applicable. Here there is something which may be differentiated from rent in the ordinary sense of the term; the rack-rent in the ordinary sense of the term is the rent paid by the farmer. Hamilton J. goes on: "and yet is a profit arising from land." This, I think, is a profit arising from land, and it is necessary for me to say why I think so.

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(1) [1929] A. C. 213; [1931] A. C. 540.

(2) [1930] A. C. 432.

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(1) [1930] A. C. 432.

(2) [1912] 2 K. B. 61, 68.

The position here is this: the respondents were the owners of the surface, and as an incident of their ownership they had an easement of right to support; but it does not really matter very much whether one calls it an easement, or not. It does not seem to me to matter whether it is an incorporeal hereditament, though, if necessary, I should be disposed to hold that Mr. Hills was right when he said that the owner may be regarded as having carved out of his estate what is really in the nature of an incorporeal hereditament. The respondents here were the owners of the land. As owners and as one of the incidents of ownership they had a valuable right—namely, the right to have their land supported by the minerals lying under it. They choose to turn that right to account; they choose to give some of it away and to give it away in return for an annual payment. Now it seems to me that that is within the fair meaning of this r. 7, and I do attach weight (appreciating as I do the distinction which Mr. Latter quite correctly drew) to the passage in the judgment of Hamilton J. in *Hill* v. *Gregory*. (1) Many illustrations

(1) [1912] 2 K. B. 61.

may be put in connection with the substance of the case. I suggested earlier in the argument a possible illustration based upon tolls, and that was to some extent developed both by the Attorney-General and by Mr. Hills. Numerous illustrations occur to one of various matters for which charges might be made, charges to certain specific people for rights to walk across the ground and things of that sort. If annual sums are made in these ways it seems to me that they come fairly within the meaning of r. 7. They are "profits, not before enumerated, arising from the lands, tenements and hereditaments," and I am unable to accept the view which Mr. Latter urged, that you must have a completely new property, different from the property which was charged to the general Sch. A assessment. If there is a profit arising out of the land, which may be differentiated from rent in the ordinary sense of the term, because the owner of the land chooses to put to profitable use an incident of his ownership which is of value to him—whether you call it an easement or not—then the case is brought within the terms of No. II., r. 7. I cannot entertain any doubt that this is income, but I have come to the conclusion, not without hesitation, that Mr. Latter's argument is not right. If I had thought it right, I should have given effect to it, because it is vital, not merely that the Crown should say "here is income which ought to be charged," but that they should also point to the charging section which hits the case. I think here that they do successfully point to this charging section, and that the Commissioners came to a wrong conclusion. They said: "Having considered the evidence and arguments adduced before us we held that the said rents were not liable to assessment under r. 7 of No. II., Sch. A, or Case III. or Case VI. of Sch. D, and that the third contention submitted on behalf of the respondents was correct and accordingly allowed the appeal and thereupon discharged the assessments." The third contention was that "income tax had already been charged under Sch. A of the Income Tax Act, 1918, on the full annual value of the said land and no further charge could be made under Sch. A in respect of the said land." The Commissioners accepted that third contention, and, for the reasons which I have given, I am unable to think that correct. On the ground that, though income tax under Sch. A had already been levied on the full annual value of the land, yet a further charge under this r. 7 could be levied, I decide this case in favour of the Crown.

*Appeal allowed.*

F. P. F.

J. H. and F. H. Burn appealed. The appeal was heard on July 6 and 7, 1933.

*Latter K.C.* and *J. Charlesworth* for the appellants.

*Sir Thomas Inskip A.-G.* and *R. P. Hills* for the Crown.

The arguments used in the Court below were substantially repeated.

The following additional authorities were referred to: *Backhouse* v. *Bonomi* (1); *Dalton* v. *Angus* (2); *Humphries* v. *Brogden* (3); *Back* v. *Daniels* (4); *Inland Revenue Commissioners* v. *Miller*. (5)

LORD HANWORTH M.R. This case raises an interesting point, but it is to my mind, completely answered by the facts of the case. I should be prepared to assent to most of the arguments that have been presented for the Crown, if they were in any way applicable to the facts of the case. I must, therefore, state the facts as I understand them. The respondents, who are now the appellants, Messrs. J. H. and F. H. Burn, are the surface owners of certain lands at North Follonsby in the county of Durham. There are minerals under that land, and those minerals belong to and are worked by John Bowes & Partners, Ld., colliery owners; in other words, Messrs. J. H. and F. H. Burn had the surface and the surface only of these lands: they had no interest in the minerals. The surface of

(1) [1861] 9 H. L. C. 503.
(2) [1881] 6 App. Cas. 740.
(3) [1850] 12 Q. B. 739.
(4) [1925] 1 K. B. 526.
(5) [1930] A. C. 222.

the land, which does belong to Messrs. J. H. and F. H. Burn, is let by them and is in the occupation of a farmer at an annual rack-rent of 296*l*., and this is taxed under Sch. A accordingly. So that so far as the surface goes, which is owned by these present appellants, that surface has been handed over to the occupation of the farmer, and Sch. A tax has been paid in respect of the ownership of the surface of the land.

It is plain beyond doubt that you can have many items of property in lands which are not occupational; you may have a number of rights in relation to the lands, such as are indicated in No. II. of Sch. A, which we have been discussing you may find that there are tithes; there are royalties in the case of manors; you can have fines received in consideration of any demise of lands, or the like, based upon the fact that those are paid independently of the actual occupation of the land. But this sum which has been paid in the course of these years arises under an agreement, para. 3 of which is as follows: "And whereas the lessors claim"—the lessors being Messrs. J. H. and F. H. Burn—"that the lessees are not entitled to work any of the said mines and seams of coal with or under the said lands or adjacent thereto in such manner as to let down the surface thereof and that the lessees are liable to pay damages to them for injury already caused to the said lands or some part thereof by the letting down of such surface and it has been agreed between the lessors and the lessees that the lessors shall grant to the lessees liberty in working the said mines and seams of coal to let down such surface upon the terms hereinafter appearing." Therefore, full liberty in working the mines and seams of coal is granted to the lessees on the terms of certain payments. What is that right that has been given? It is in no sense analogous to a licence to use a pathway, a licence to lay down a tramway over the surface of land and take a toll in respect of the things that pass over it; it is in no sense a licence to make use of some of the advantages to which the land as land can be put. There is, on the part of the owner of the surface, a right to protect his land against an invasion of that surface by letting it down, and, as has been pointed out—and one goes back to the origin of the subject-matter of this agreement—it is a right to claim that the owner of the surface is entitled to support, not by means of an easement acquired—he might have to acquire the easement if he put a house upon it—but to support as inherent to the surface. In *Humphries* v. *Brogden* (1) it was said by Lord Campbell C.J.: "If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and, if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed."

Considered as land or surface, there is no question that this land has paid its tax; it has been taxed under Sch. A. The owner who has demised the land to the occupier of the surface is minded to make an agreement whereby he says: "I will not take proceedings against you for an injunction to prevent you, the worker of the minerals, over which I have no right, from working the minerals in some way which you may wish to do." The Attorney-General said that the owner of the surface of the land had a right to prevent trespasses. So he has, a power—I do not call it a right; he has a power to prevent trespasses being committed against or upon his land. That is an inherent right, and in the case of the right to support, it has been established, in *Backhouse* v. *Bonomi* (2), to which our attention was called by Mr. Latter, that he has that right, but the right of action accrues as and when and not until the surface of the land is actually injured. Let us see whether or not the agreement not to take proceedings by way of an injunction to enforce a right if and when the exercise of that right should cause damage is a matter which is brought within the Income Tax Act, 1918. By s. 1 there is a tax given under certain circumstances which are fulfilled. The section enacts

(1) 12 Q. B. 739, 746.

(2) 9 H. L. C. 503.

that income tax shall be charged at a certain rate for that year in respect of "all property, profits or gains respectively described or comprised in the Schedules marked A, B, C, D and E contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those Schedules." Let us go to the Schedules, and look at the property, profits or gains, which are comprised in them. Sch. A says: "Tax . . . . shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, for every twenty shillings of the annual value thereof." That is the charge. Then, proceeding, we find the rules that are applicable for estimating the annual value. No. II. gives one the "Rules for estimating the annual value of certain Lands, Tenements, Hereditaments or Heritages which are not to be charged according to the preceding General Rule and for determining the person chargeable." I quite agree that No. II. refers to a number of interests in land which are not occupational. It is said that r. 7 will sweep in this sum which is payable to the owner of the surface, to my mind entirely divorced from the land, and these are the words: "In the case of all other profits not before enumerated (other than profits liable to deduction in pursuance of rules 1 and 4 of No. VIII. of this Schedule) arising from lands, tenements, hereditaments or heritages not being in the actual possession or occupation of the person to be charged." Is this, within a reasonable interpretation of the words, a profit arising from the lands, tenements or hereditaments? Never mind whether it is occupational or not; can it really be said to be a profit which arises out of the land, it being in truth and in fact a sum which is given to the owner of the land to debar him from exercising the protective rights which he has in favour of the land? It does not arise out of any user of the land; it is occasioned by reason of the misuser of the mines which let down the surface; it is a payment in respect of the value of the surface becoming less; it is a sum paid to the landowner to restrain him from exercising a protective power. The land itself has already paid tax; it has suffered under Sch. A, and this seems to be an independent agreement, apart from any user of the land, apart from any profit arising from the land; it is no doubt a sum quantified by the amount of the minerals which are taken by the owners of the minerals from their mines in which these appellants have no part or lot, for they do not own the minerals—that is how it is quantified, but in truth and in effect it is a sum to deter and to stay the hands of these owners of the surface which has duly paid its tax under Sch. A. It comes back to this: I think the respondents to this appeal have overlooked the fact that you cannot bring every single payment that is made of all kinds and sorts within Sch. A. You must show that the payment has been made in respect of property in lands, tenements, hereditaments or heritages, and that it is in respect of a profit which arises from the lands. From the facts of this case, it appears to me that those words are at the very outset of the case not satisfied, and the Crown have not complied with the onus which initially lies upon them of showing that the money received under this agreement was something that fell within even the widest interpretation of Sch. A and the rules for the elucidation of its terms. On these grounds the appeal must be allowed with costs here and below.

LAWRENCE L.J. The question in this case is whether or not the rent payable under the agreement of December 26, 1906, comes within the provisions of r. 7, No. II. of Sch. A, as being "other profits not before enumerated . . . . arising from lands, tenements, hereditaments or heritages." By the agreement, the owners of the surface agreed to grant to the colliery company, the owners of the underlying minerals, full liberty to work those minerals without leaving support for the surface and, in consideration of the liberty so granted, the grantees agreed to pay a yearly certain rent of 150*l.* and a further rent of 1½*d.* for every ton of coal worked under the surface, the certain rent merging in the 1½*d.* rent. The rents so payable by the grantees are not in my opinion profits or rents arising from the land of the grantors: that is to say they are not profits which are yielded by any user of the grantors' land on the part of the grantees; they are payments, as the Master of the Rolls has said, agreed to be made by persons who neither have nor take any estate or interest in or over the land of the grantors for the privilege of being able to work their own minerals without let or hindrance notwithstanding that they may thereby do damage to the land of the grantors. Such payments do not in my opinion come within any of the heads of receipts enumerated in No. II. of Sch. A. In my judgment the tax assessed and paid under No. 1 of Sch. A is in the circumstances of this case the only tax which is payable in respect of the property in the land in question, including in such property the natural right of support incident to it, and no further tax is payable under Sch. A in respect of the profits or other receipts made or received by the owners in respect of that land. For these reasons, I agree that the appeal succeeds.

SLESSER L.J. I agree that this appeal must be allowed for the reasons stated by the Master of the Rolls. I have nothing to add.

*Appeal allowed.*

Solicitors for appellants: *Gregory, Rowcliffe & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

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# KNOTT *v.* LONDON COUNTY COUNCIL.

*Dog—Master and Servant—Common Employment—Injury by savage dog belonging to fellow-servant—Dog not kept for master's purposes—Servant's knowledge of dog's vice not imputed to master.*

The plaintiff was a charwoman who was employed as a cleaner at a school owned by the defendants, the London County Council, and was bitten by a dog, an Airedale, while doing her work at the school. The dog belonged to and was under the control of the school-keeper, who lived on the school premises, and was forbidden to keep any domestic animal except a cat or a dog. He kept the dog in question as a pet, and not as a watch-dog or otherwise for the benefit of the defendants. The school-keeper was aware that the dog had formerly attacked a boy, and the county court judge found as a fact that he knew the dog to be accustomed to attack mankind. The defendants did not know that the school-keeper had a dog. In an action by the plaintiff for keeping a dog which was known to be of a fierce and mischievous nature and accustomed to attack and bite mankind:—

*Held*, that the knowledge of the school-keeper that the dog was accustomed to attack mankind was not acquired by him as the servant of the defendants, and the plaintiff showed no cause of action against them.

Per Lord Wright: "I think both the common law and the Legislature in the Dogs Act, 1906, have recognised that a dog, which has been described as 'a familiar animal,' is naturally so associated with a particular master that responsibility for its acts should depend on ownership or possession and control."

APPEAL from Southwark County Court.

The plaintiff, Harriet Kate Knott, widow, was in the employment of the defendants, the London County Council, as a cleaner of the premises of schools belonging to them. One of these schools was the Ramsey Street School, Bethnal Green, E., and a Mr. Frankland was in the employment of the defendants as the school-keeper at these premises. The "School-keeper's Handbook," issued by the defendants, prescribed the duties of the school-keepers, r. 2, providing that the school-keeper was responsible, among other things, for the safety of the school premises, and r. 147 being as follows: "In the event of a dog being kept the school-keeper will be held responsible for seeing that it is kept under proper control and is not allowed to run loose in the playground." On November 30, 1931, while the plaintiff was in the course of her employment at the above-named school, she was bitten on both legs by a dog belonging to Mr. Frankland.

On January 26, 1932, the plaintiff brought an action against the defendants in the county court, alleging in her particulars of claim that she had suffered damage from personal injuries caused to her on the date and at the place last mentioned; that she was in the course of her employment at that time and place when she was attacked and bitten by the said dog; and that the defendants caused or permitted the said caretaker, their servant or agent, to keep on their premises the said dog, which was of a fierce and mischievous nature and accustomed to attack and bite mankind, and that the defendants, their servant or agent, wrongfully kept the dog well knowing that it was of that nature and so accustomed; and claiming 75*l.* damages.

The defendants in their defence denied that they caused or permitted the said caretaker to keep the dog in question upon their premises; denied that the dog was of a fierce or mischievous nature or accustomed to attack or bite mankind; denied that they kept the dog wrongfully or at all; and denied that they knew that the dog was of a fierce or mischievous nature or accustomed to attack or bite mankind; and alleged that the dog was kept, if at all, by the caretaker whose property it was for his own private purposes, and that the defendants were not responsible in law in respect of the matters complained of by the plaintiff.

On April 14, 1932, the trial began before the county court judge and a jury. Evidence was called on behalf of the plaintiff which showed, among other things, that, about 18 months before, the dog had more than once attacked a boy named Thomas Conlan, in Bethnal Green, and that his uncle, Mr. Polson, had complained to Mr. Frankland about these occurrences. At the close of the plaintiff's case counsel on both sides agreed to dispense with the jury, and the judge accordingly discharged the jury and continued the hearing alone.

The county court judge found that the dog had a propensity to attack mankind, and that the school-keeper had knowledge

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of its nature. He was of opinion that it was the duty of the defendants to keep the school reasonably safe, that they had delegated that duty to the school-keeper, that he had negligently permitted the dog, which he knew to be savage, to be at large upon the premises, that his knowledge and negligence must be regarded as those of his employers, the defendants, and that the defendants must therefore be taken to have been negligent; but he was further of opinion that, as both the plaintiff and the school-keeper were in the service of the defendants, the doctrine of common employment debarred the plaintiff from recovering from the defendants; and with some regret he therefore gave judgment for the defendants.

The plaintiff gave notice of appeal to the Divisional Court on the ground that the county court judge was wrong in law in holding that the doctrine of common employment precluded the plaintiff from succeeding, and in giving judgment for the defendants.

The defendants gave notice that they intended at the hearing of the appeal to contend, if and so far as the same might be necessary, that the judge was wrong in law in holding (i) that there was any evidence of scienter on the part of the defendants, (ii) that the negligence of Mr. Frankland arose in the course of his employment as a servant of the defendants, (iii) that the defendants were responsible in law for the act or omission of their servant, Mr. Frankland, in and about the keeping of a dog; and that, for these reasons, even if the judge was wrong in law in holding that the doctrine of common employment precluded the plaintiff from succeeding, nevertheless the judgment of the judge should be confirmed and the appeal dismissed.

The plaintiff appealed.

*F. G. Paterson* and *Norman E. Wiggins* for the plaintiff, appellant.

*R. T. Monier-Williams* for the defendants, respondents.

*Cur. adv. vult.*

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April 3. The following considered judgment of the Court (ACTON and GODDARD JJ.) was delivered by

GODDARD J. The judgment I am about to give is the judgment of the Court.

This case, which raises an interesting point, is an appeal from a decision of His Honour Judge Moore, whereby he gave judgment for the defendants in an action brought by the plaintiff to recover damages for injuries caused by the bite of a dog, inflicted on her while she was working as a charwoman at a school owned by the defendants. By her particulars of claim the plaintiff raised no issue of negligence; she relied for her cause of action simply on the ground that she had been bitten by a dog known to have the propensity to attack mankind, a cause of action of which negligence in the owner or keeper of the dog forms no part. The learned judge has held that the defence of common employment is open to the defendants in the circumstances of this case, and in the result we agree with him.

The facts are that the dog was owned by the school-keeper of the school at which the plaintiff also worked. The school-keeper's duties are set out in a Book of Rules called the "School-keeper's Handbook," and by r. 2 he is responsible, among other things, for the safety of the school premises. By r. 147 a school-keeper is allowed to keep a dog, for the proper control of which he is responsible. The dog in question belonged to the keeper of the particular school, and in the past it had attacked on more than one occasion a lad named Conlan, whose uncle, one Polson, had complained to the caretaker about it. On this evidence the judge held that the dog was known to the school-keeper to be accustomed to attack mankind, and that, had the action been brought against him, there would have been no defence. The argument for the plaintiff was that the knowledge of the school-keeper was the knowledge of the defendants, and that accordingly they were knowingly harbouring on their premises a savage dog, for which they were liable. To this argument two answers were made: (1.) that the knowledge of the servant was not the knowledge of the master, and (2.) that the dog was in any event not under the control of the defendants, and that the person having the control was alone answerable for injuries inflicted by it.

On the first point, in our judgment, if the action had been brought by a person not a fellow servant of the caretaker, the defendants would not have been able to say that they had no knowledge of the dog's propensity. The cases of *Stiles* v. *Cardiff Steam Navigation Co.* (1) and *Baldwin* v. *Casella* (2) seem to us conclusive on that point. But the question here is whether this doctrine applies where the plaintiff is in common employment with the servant who had the knowledge. We think it does not. In *Stiles* v. *Cardiff Steam Navigation Co.* (1), Crompton J., said: "I quite agree that the knowledge of a servant, representing his masters and acting within the scope of their delegated authority, may be competent to affect his masters with that knowledge"; and Shee J., said: "Corporations are in this respect in no different position from private owners; and if it could be shown that the mischievous propensity of the dog was known to any person having the control of the business, or of the yard, or even of the dog, or whose duty it would be to inform the company of what the dog had done, it might do." In *Baldwin* v. *Casella* (2), Martin B., said: "the coachman knew that the dog was mischievous, and it is immaterial whether he communicated the fact to his master or not; his knowledge was the knowledge of his master." It is clear in our opinion that this doctrine depends on the ordinary rule of "respondeat superior": it is the duty of the servant to communicate the propensity of the animal to his master, and if he fails in his duty, this failure cannot affect a stranger. It is here, however, that the doctrine of common employment comes in: Can a servant rely on the fact that the only knowledge was that of a fellow servant, even though the employer was a corporation? The whole doctrine of common employment has recently been elaborately discussed by the Court of Appeal in *Fanton* v. *Denville* (3), where all the cases are reviewed, and it was held that where a master has used reasonable care in delegating, and is not aware of the negligence of the delegate, he is not liable for the consequences of the negligence of the fellow servant. That was the case of the supply of improper plant; the duty of supplying had been delegated to competent persons who had provided improper plant. It is the duty of the master to supply proper plant, but that duty may be delegated. If the argument advanced in the present case were right, it seems to us to follow that in every case where the delegate knows that the plant is improper, or the premises unsafe, the master would be fixed with liability to a fellow servant, which is exactly contrary to what the Court of Appeal decided in *Fanton* v. *Denville.* (1) We are bound, in our judgment, to hold that this case precludes us from holding that the knowledge of the schoolkeeper was the knowledge of the defendants, or that they can be liable on the alternative ground of allowing their premises to be in a dangerous condition. The case of *Williams* v. *Birmingham Battery and Metal Co.* (2) is explained in the last cited case by Scrutton L.J., as one in which the employer was treated "as having with personal knowledge provided a dangerous system," and as not binding the Court to hold that "where the employer has taken reasonable care to appoint competent people to provide plant he is liable if they, without his knowledge, negligently provide dangerous plant."

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(1) (1864) 33 L. J. (Q. B.) 310.
(2) (1872) L. R. 7 Ex. 325, 326.
(3) [1932] 2 K. B. 309.

Mr. Paterson argued that as the employer was a corporate body, knowledge in any servant whose duty it was to communicate the information to the employer, affected the corporation. We do not agree with this contention. Mr. Monier-Williams rightly pointed out that one of the inconveniences of this highly artificial doctrine of common employment is the difficulty in affecting a corporate employer with notice. Recent decisions show that at least directors of a trading company may be regarded as the corporation itself for this purpose, and not as fellow servants—see

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(1) [1932] 2 K. B. 309.

(2) [1899] 2 Q. B. 338.

*Baker* v. *James Brothers and Sons, Ld.* (1) and *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (2), so possibly if the information had been conveyed to the Council in session, it would have sufficed to fix the defendants with knowledge, but the fact is that the schoolkeeper kept the information to himself. It may well be that in so doing he committed a breach of his duty, as also in not keeping the dog under control as required by the Rules, but a servant cannot found an action against the employer upon a fellow servant's default.

But apart from this point, and even were we wrong in the view we have expressed, there is another difficulty in the plaintiff's way caused by the case of *North* v. *Wood* (3). But for that case, we should have held that, had scienter in the defendants been established, it was a case of an occupier of property harbouring a dog known to him to be dangerous, and we should have thought the case was within the principle laid down by Lord Tenterden in *M'Kone* v. *Wood* (4), where he says: "It is not material whether the defendant was the owner of the dog or not; if he kept it, that is sufficient; and the harbouring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support this form of action." *North* v. *Wood* (3), however, decides that the test is the control of the dog, and consequently in that case where a father allowed his daughter of 17 years of age to keep a dog which he knew to be dangerous, he was held not liable, because his daughter lived on the premises, and, as the county court judge found, had control of it. Here there can be no question but that the control of the dog was in the school-keeper and not in the defendants. This case is binding upon us, though, if we may say so, we do not follow the grounds upon which the court distinguished it from *M'Kone* v. *Wood.* (4) Ridley J. said that in the latter case, the defendant, though not the owner, treated the dog as his and was held liable because there was no one else on the spot who could exercise control over it. With all respect, it seems to us that the ground on which Lord

(1) [1921] 2 K. B. 674.
(2) [1915] A. C. 705.
(3) [1914] 1 K. B. 629.
(4) (1831) 5 C. & P. 1.

Tenterden proceeded in directing the jury was that ownership or control was immaterial; what did matter was allowing the dog to be on the premises. However, that case must be challenged, if at all, in the Court of Appeal; this Court is bound by it, and it seems to us in any view of the matter to be enough to defeat the plaintiff's case.

We ought to say a word about one further argument addressed to us by Mr. Paterson. He contended that as in the case of an injury from a savage animal, the plaintiff had a cause of action apart from negligence, the case was analogous to those in which it has been held that where an absolute duty has been imposed on an employer towards his servants, the defence of common employment is in no case open to him. *Groves* v. *Lord Wimborne* (1) is a leading example and we believe that all the cases on this subject relate to duties imposed by statutes dealing with factories or firms. The fallacy in his argument is that the owner of a vicious or dangerous animal does not commit a breach of duty to any one merely by keeping it on his premises, though he keeps it at his peril, and *North* v. *Wood* (2) decides that it is the person who controls the dog and not the householder or owner of the premises who is liable for its mischief.

The appeal must be dismissed with costs, the plaintiff having leave to appeal if she so desires.

*Appeal dismissed.*

J. R.

The plaintiff appealed. The appeal was heard on October 6, 9, 1933.

*F. G. Paterson* and *Norman E. Wiggins* for the appellant. The question of negligence does not arise: *May* v. *Burdett* (3). There has been a failure to perform an absolute duty, and negligence need not be alleged or proved: *Groves* v. *Lord Wimborne* (1). See also *Smith* v. *Great Eastern Railway Co.* (4); and *Applebee* v. *Percy* (5). The person who keeps a

(1) [1898] 2 Q. B. 402.
(2) [1914] 1 K. B. 629.
(3) (1846) 9 Q. B. 101.
(4) (1866) L. R. 2 C. P. 4, 12.
(5) (1874) L. R. 9 C. P. 647, 656.

dangerous dog is an insurer, and to make him liable it is sufficient to prove that he harboured it on his premises: *M'Kone* v. *Wood.* (1) The doctrine of common employment does not apply. The knowledge of the servant in this case that the dog was dangerous was the knowledge of his employers, the defendants: *Baldwin* v. *Casella* (2); *Stiles* v. *Cardiff Steam Navigation Co.* (3) Either the plaintiff was an invitee on the defendants' premises, in which case it was the duty of the defendants to make their premises safe, or the defendants were harbouring a dangerous beast. It is true that they allowed the school-keeper to keep the dog provided he kept it under proper control. But the defendants cannot delegate their duty to control a dangerous beast on their premises. In *Penhallow* v. *Mersey Docks and Harbour Board* (4), Blackburn J. said: "If a corporation cannot know anything except by its servants, it would seem that the corporation must be liable for the knowledge of its servants and the acts of its servants, or not liable at all." If the defendants knew of the presence on their premises of a dangerous dog, they were harbouring it, using the word "harbouring" in the sense in which it was used in *M'Kone* v. *Wood.* (1) It is not essential that the dog should belong to the defendants. If the defendants harbour it, or allow it to be at, and resort to the premises, that is sufficient to establish their liability. When a master knows of the presence on his premises of a dangerous animal, he is under a duty to keep the animal under proper control. In *Smith* v. *Great Eastern Railway Co.* (5), a stray dog attacked a woman passenger and the Court held that the Railway Company escaped liability only because their servants, who knew that the dog was dangerous, had previously taken steps to remove it.

[Lord Wright: The fact that the dog was on the premises is not enough, although that may give rise to an action for breach of duty as laid down in *Indermaur* v. *Dames.* (6)]

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(1) 5 C. & P. 1.
(2) L. R. 7 Ex. 325.
(3) 33 L. J. (Q. B.) 310, 312.
(4) (1861) 30 L. J. Ex. 329, 331.
(5) L. R. 2 C. P. 4.
(6) (1866) L. R. 1 C. P. 274.

The plaintiff is entitled to succeed if she proves that there was a dangerous dog on the premises and that there has been a breach by the defendants of an absolute duty to restrain the animal from attacking persons lawfully on the premises.

[SLESSER L.J.: The plaintiff's argument would be stronger if the dog was kept to drive away rats, and not, as here, as a pet.]

It is submitted that it is sufficient for the plaintiff to show that the keeping of the dog was within the scope of the school-keeper's authority, and that he failed to keep him under proper control.

*Monier-Williams* for the respondents. The law imposes on the keeper of an animal responsibility for everything that the animal does, and the keeper need not be the owner of the dog. In the legal sense the keeper is either the owner or some person who has put himself into the position of the owner. If the question in the present case be one of fact, the question of fact has been decided by the county court judge, for he found that Frankland, the school-keeper, was the keeper of the dog and not the defendants. But if the defendants were the owners and keepers of the dog and were negligent the doctrine of common employment must be applied. In Salmond on Torts, 7th edition at p. 498, it is stated that "although it is usual and convenient to speak of the liability of the owner of an animal, liability does not primarily depend on ownership. It depends on possession. He who keeps an animal is responsible for its acts, whether he is the owner of it or not: *M'Kone* v. *Wood*." (1) The occupier of the premises on which the animal is kept is not responsible for it unless he is also the keeper of it, even if it is kept there with his permission and with his knowledge of its dangerous character. The material question is: who had the control of the animal? *North* v. *Wood*. (2) The county court judge found as a fact that the school-keeper had the control of the dog. The defendants are not liable.

*F. G. Paterson* replied.

*Cur. adv. vult.*

(1) 5 C. & P. 1. (2) [1914] 1 K. B. 629.

1933. Oct. 20. The following judgments were read :—

LORD HEWART C.J. This is an appeal from a judgment of the Divisional Court, dismissing an appeal from his Honour Judge Moore, who gave judgment for the defendants in an action by the plaintiff to recover damages for injuries caused by the bite of a dog. The plaintiff is a charwoman who was employed as a cleaner at a school owned by the defendants, the London County Council, and was somewhat severely bitten by a dog, an Airedale, while doing her work at the school.

The dog was owned and under the control of the school-keeper, who lived on the school premises, and was forbidden by the rules governing his employment to keep any domestic animal except a cat or a dog, and he kept the dog in question as a pet, and not for the purpose of guarding the premises or otherwise for the benefit of the defendants. The school-keeper was aware that on previous occasions the dog had attacked a boy, and the learned county court judge held that there was sufficient evidence of knowledge on the part of the school-keeper that it was accustomed to attack mankind to have rendered him liable for the injuries to the plaintiff if she had brought an action against him. But the defendants had no knowledge of the mischievous propensities of the dog or even of the fact that a dog was kept on the premises.

It is said, however, that the knowledge of the school-keeper was equivalent to the knowledge of the defendants, who must therefore be taken to have known that a savage dog was being kept on the premises. It is quite true that the knowledge of a servant may be imputed to his master, but that is only when the knowledge is acquired by the servant as such in the course of his employment on the master's behalf. Here the knowledge was not acquired by the school-keeper as the servant of the defendants, but as the owner and keeper of the dog. The case is not like *Baldwin* v. *Casella* (1), where the master was the owner of the dog and the knowledge imputed to him was that of his coachman, under whose care and control the dog was kept ; nor like

(1) L. R. 7 Ex. 325.

*Stiles* v. *Cardiff Steam Navigation Co.* (1), where the dog was kept for guarding and protecting the premises of the corporation.

With all respect to the Divisional Court and to the learned county court judge, I do not think that the question of negligence or the doctrine of common employment arises in this case. The action is for keeping a dog which was known to be of a fierce and mischievous nature and accustomed to attack and bite mankind, and in such an action negligence is not an issue.

I can see no ground on which the defendants can be held liable for the injuries to the plaintiff, and I think that the appeal should be dismissed with costs.

LORD WRIGHT: I agree. The facts in this case are simple. The appellant, who was plaintiff in the action, was a cleaner employed by the respondents, the defendants, at their school at Bethnal Green. While sweeping out a room in the school, she was attacked and badly injured by an Airedale, which was owned by the school-keeper, Frankland, who lived in dwelling quarters in the school premises. He kept the dog for his own private purposes as a pet; the licence was in his name. By the general rules of the respondents, caretakers were permitted to keep dogs on condition that they should keep them under proper control. It was found by the county court judge that Frankland had knowledge that the dog was prone to attack mankind, as he found it was. Major White, the head of the council's staff of school cleaners, gave evidence that no complaints had been received by the respondents in respect of the dog kept by Frankland.

On these facts, the appellant brought her claim for damages against the respondents. The basis of her claim is that pleaded in paragraph 3 of the particulars of claim, which is in these terms: "The defendants caused or permitted the said caretaker, their servant or agent, to keep on their premises the said dog which was of a fierce and mischievous nature and accustomed to attack and bite mankind, and the

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(1) 33 L. J. (Q. B.) 310.

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defendants, their servant or agent, wrongfully kept the said dog, well knowing that it was of such a fierce or mischievous nature and so accustomed."

The claim so formulated is for breach of the strict or absolute duty to keep safely a dangerous animal. An alternative claim might have been put forward, but was expressly disavowed, that is, a claim that the respondents had committed a breach of duty in failing to take reasonable care to ensure that the room to which the appellant had resorted for the purpose of doing work on their behalf was safe for her to work in. It is true that she was there on the respondents' business, and if she had not been their servant could have claimed as being an invitee, on the principles laid down by Willes J. in his judgment in *Indermaur* v. *Dames*. (1) But Willes J. excludes, inter alia, the case "of a servant and others who consent to incur a risk," no doubt in view of the doctrine of common employment. In the present case the failure to take reasonable care was the act and default of Frankland, the servant charged with the duty of keeping the school premises safe, in not seeing that the dog, which he knew to be dangerous, should not be at large where the appellant was working. Frankland was her fellow-servant and hence, by the effect of the doctrine of common employment, any claim so formulated was bound to fail, as the appellant's counsel frankly admitted. What was pressed was the claim as pleaded in the terms above set out, which was founded on a higher and more stringent duty—the absolute duty of keeping safely a dangerous animal. No doubt a dog is prima facie mansuetae naturae, but it becomes in law a dangerous animal if it is proved to have the propensity to attack mankind. Once knowledge of that propensity is brought home to the keeper of the dog, he keeps the dog at his peril, so that if it escapes from his control and attacks and injures any one, he is liable apart from any question of negligence. It is true that it is not unlawful or wrongful to keep such an animal; the wrong is in allowing it to escape from the keeper's control with the result that it does damage.

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(1) L. R. 1 C. P. 274, 284.

Damage is thus the gist of the action. A dog under these conditions comes to be classed for this purpose with beasts naturally savage, such as a lion or tiger. That such an absolute duty affects the keeper of such an animal once his knowledge (or what is called the scienter) of the animal's vice is established, has long been recognised to be the law. Thus in *Mason* v. *Keeling* (1), Holt C.J. said of animals: "If they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of tame nature, there must be notice of the ill quality." Dogs fall into the latter category, and accordingly, in such a case, come within the rule of *Fletcher* v. *Rylands* (2), which deals with the strict or absolute liability for the safe keeping of things which are likely to do mischief if they escape; if they escape and cause damage the keeper is prima facie answerable for all the damage which is the natural consequence of its escape. It is not material to allege or prove negligence in the defendant—as was held, for instance, with reference to a monkey, in *May* v. *Burdett*. (3)

For the purposes of this case it is not material to examine what are the various exceptions to this liability, as, for instance, whether it is any excuse that there intervened the unauthorised and wilful act of a third party—a question which was discussed in the controverted case of *Baker* v. *Snell*. (4) In the present case the appellant, on the assumption that the respondents are liable for the safe keeping of the animal, and have knowledge of its vicious character, goes on to claim that the defence of common employment cannot be invoked, any more than in the case of breach of an absolute statutory obligation in regard to which cases it was held in *Groves* v. *Lord Wimborne* (5), that the defence did not apply. The principles of *Groves* v. *Lord Wimborne* (5) were recently discussed and approved by the House of Lords in the case of *Lochgelly Iron and Coal Co., Ld.* v. *M'Mullan*. (6) But there is no precise authority for the extension of that rule of strict or absolute liability not under a statute but under the common law, such as for the keeping of dangerous animals. It may, however, well be that in such cases the defence of common employment has no place. There is, however, no need here to decide that point, because the appellant must found her case on proof that the respondents were in any sense responsible for the dog, which she can only do by establishing, first, that it was the respondents' dog or kept by them, and secondly, that they had actual or imputed notice of the dog's propensities.

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(1) (1700) 12 Mod. Rep. 332, 335.

(2) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.

(3) 9 Q. B. 101.

(4) [1908] 2 K. B. 352, 825.

(5) [1898] 2 Q. B. 402.

(6) (1933) 49 Times L. R. 566.

In my opinion the appellant's case breaks down on the first head. It was no part of Frankland's duty to his employer to keep the dog, nor was it incidental to his duty to them. He did not keep it in any sense for the purpose of watching or guarding the school premises; so that it need not be considered what in such a case the legal position of the respondents would be. It is expressly found that he kept it for his private purposes, because it was his personal pet. All that can be said to connect the respondents with the dog is that Frankland, like other school-keepers employed by the respondents, had a general licence to keep a dog or cat; but in my judgment Frankland, in keeping the dog as he did, did so on his own responsibility and as his own affair, and the position is not different from that of a chauffeur who keeps his dog in the room over the garage, or a groom who keeps his dog in his rooms over the stables. In such cases as *Baldwin* v. *Casella* (1), and *Applebee* v. *Percy* (2), the dog was owned by the defendant. It is true that the real test of responsibility is not ownership but possession and control; hence in *M'Kone* v. *Wood* (3), Lord Tenterden in ruling before the jury put as the test whether the defendant was "harbouring the dog." The ruling was a ruling at nisi prius and the facts of the case are not very fully or precisely stated, but I understand Lord Tenterden was ruling on a case where a dog was allowed, with the defendant's knowledge, to live on his premises, where it had been left by a former servant on his going away. In such a case it might well be found in fact that there was possession and control in the occupier, there being no one else on the premises to exercise control or claim possession. In *May* v. *Burdett* (1), Denman C.J., in stating the principle applicable to such cases, states it with reference to " whoever keeps an animal " under the material conditions; and Platt B., in *Jackson* v. *Smithson* (2), speaks of the liability as attaching to " the act of keeping " such an animal. In *North* v. *Wood* (3), the occupier of the premises on which there was a vicious dog was held not responsible for the dog though he knew it to be savage. The dog was owned by his daughter, who lived with her father and who paid for its food and for the licence, and was of sufficient age to control the dog. In my opinion the true test of liability, namely, that of ownership or possession and control, was applied in that case having regard to the facts of the case as found by the county court judge. It may be noted that the Dogs Act, 1906 (6 Edw. 7, c. 32), puts the liability under that statute for damage done by dogs to cattle on the " owner of the dog," with the proviso that the occupier of any premises where the dog was kept or permitted to live or remain shall be presumed to be the owner and shall be liable for the injury unless he proves that he was not the owner of the dog at the material time. I think both the common law and the Legislature in the Dogs Act, 1906, have recognized that a dog, which has been described as a " familiar animal," is naturally so associated with a particular master that responsibility for its acts should depend on ownership or possession and control, neither of which can be predicated, in regard to Frankland's dog, of the defendants. In my judgment the defendants on this ground are not responsible and the action is not maintainable against them.

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(1) L. R. 7 Ex. 325.
(2) L. R. 9 C. P. 647.
(3) 5 C. & P. 1, 2.

On the issue of scienter I need only add that there is no evidence that any responsible official of the respondents knew of the dog's savage disposition or even knew that it was kept

(1) 9 Q. B. 101, 110.
(2) (1846) 15 M. & W. 563, 565.
(3) [1914] 1 K. B. 629.

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by Frankland. In view of Frankland's relation to the dog and the fact that the respondents were not concerned with the dog and had neither property in nor possession of it and made no use of it, I can see no ground whatever for imputing Frankland's knowledge of its vicious propensities to the respondents, so that no possible ground remains to justify a holding that the respondents kept or harboured the dog.

For these reasons I agree with the Divisional Court that the appeal should be dismissed, and with the county court judge that the claim fails against the respondents.

SLESSER L.J. In this case, the plaintiff seeks damages for personal injuries to her by the bite of a dog.

The plaintiff was a cleaner employed by the London County Council in one of their schools and while she was performing her duties at the school she was attacked and badly bitten by a savage dog which was owned by another servant of the London County Council, the school-keeper, who kept it for his own private purposes. The learned county court judge has found as a fact that this school-keeper Frankland "had knowledge that the dog was prone to attack mankind—in other words that scienter had been brought home to him." On this finding, it does not appear that the school-keeper, the owner of the dog, would have any defence to an action against him; but the action in the present case is, for obvious reasons, not against him, but is brought against the London County Council—his and the plaintiff's employers—the owners of the premises where the attack by the dog took place.

The plaintiff did not seek in her particulars of claim to found her action in the negligence of Frankland in failing to have the dog under proper control or otherwise so as to make the London County Council, as his employers, liable for that negligence, because she would be met by the defence of common employment. We are told, however, that in the Courts below the action was principally so founded in negligence, and from the judgments, both in the county court and in the Divisional Court, I can well believe that that

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was so. In any event, counsel for the appellant has admitted before us that the defence of common employment, even assuming that he could make the London County Council responsible for the negligence of their school-keeper, would be a complete answer to his case. He therefore attempts to succeed in his appeal by putting the case on the absolute duty to control the dangerous dog, making it unnecessary to invoke negligence at all, and in that way only is it necessary for us to consider the case.

I have no doubt that were the appellant proceeding against an owner of the dog who was also its keeper and controller she would be perfectly right in not founding her case in negligence. The duty of a keeper of a dog who knows it to be dangerous is an absolute one. In the case of *May* v. *Burdett* (1), it was held that a person who keeps an animal accustomed to attack and bite mankind is prima facie liable in an action on the case at the suit of any person attacked and injured by such animal without any averment in the declaration of negligence or default in the securing or taking care of it. The gist of the action is the failure to control the animal after knowledge of its mischievous propensities. "The owner must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages." (Hale's Pleas of the Crown, Volume 1, page 430.) "The keeper of a ferocious dog, if he knows it to be ferocious, is in exactly the same category as the keeper of a naturally wild animal." Per Kennedy L.J., in *Baker* v. *Snell*. (2)

The duty to save harmless a person from attack by a dog known to the keeper to be dangerous is clearly an absolute one: but it is necessary in the present case that the plaintiff should go further and apply that obligation to the London County Council, who are not the owners of the dog. The only connection between the London County Council and the dog is that by a regulation dealing with the duties of school-keepers it is provided that the school-keeper, though not allowed to keep on the school premises domestic animals, such as rabbits,

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(1) 9 Q. B. 101.

(2) [1908] 2 K. B. 825, 834.

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chickens etc., may keep a dog or cat, provided that in the event of a dog being kept, the school-keeper will be held responsible for seeing that it is kept under proper control and that it is not allowed to run loose in the playground. Mr. Paterson, for the appellant, has cited to us, most, if not all, relevant cases in this matter. He points out that they establish that it is not essential that the defendants should be the real owner; that any one who keeps the dog on his premises or allows it to resort there may be liable.

The case which has gone furthest in his favour is that of *M'Kone* v. *Wood.* (1) The case is very shortly reported and is no more than a direction to a jury of Lord Tenterden. He says: "It is not material whether the defendant was the owner of the dog or not; if he kept it, that is sufficient; and the harbouring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support this form of action."

Mr. Paterson has argued that in so far as the London County Council allowed the owner to keep a dog they have allowed the dog to resort to their premises within the meaning of Lord Tenterden's direction. This, I think, is inaccurate. There must be, in my view, something in the nature of the real keeping of a specific dog to make a person who is not the owner liable. The owner may appoint a servant to keep the dog for him: see *Stiles* v. *Cardiff Steam Navigation Co.* (2); *Baldwin* v. *Casella.* (3) But such cases, where a servant is keeping a dog for a master, are quite different from the present one, where the servant kept the dog with the general permission of the master to keep dogs, but for the servant's own private purposes. Such a case resembles more closely the decision of the Divisional Court in *North* v. *Wood* (4), where the father allowed his daughter to keep in his house a dog which he knew to be savage. Ridley J. says: "It is quite true that there may be circumstances under which a person who is not the owner of a dog may be bound to exercise control over it and will be responsible if it bites somebody. Such circumstances existed in the case [cited] of *M'Kone* v. *Wood* (1), where the defendant, who, although not the owner, treated the dog as if it was his, was held liable because there was no one else on the spot who could exercise control over it." He points out that in *North* v. *Wood* (2), the defendant's daughter, who was the owner of the dog, had the control of it, that is, was the keeper, and so distinguishes the case before him from *M'Kone* v. *Wood.* (1)

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(1) 5 C. & P. 1, 2.

(2) 33 L. J. (Q. B.) 310.

(3) L. R. 7 Ex. 325.

(4) [1914] 1 K. B. 629, 631.

In the third edition of Bullen & Leake, page 366, the learned authors cite as an appropriate declaration in such a case: "That the defendant wrongfully kept a dog of a fierce and mischievous nature and accustomed to bite mankind, well knowing that the said dog was of such fierce and mischievous nature and so accustomed as aforesaid." Such a declaration is to be found in the case of *Worth* v. *Gilling.* (3)

In my view, the plaintiff fails at the outset because she is not able to say here that directly or indirectly the London County Council owned or kept the dog of which complaint is made. In these circumstances, the question whether the knowledge of the owner of the dog that the dog was prone to attack mankind can be properly imputed to the London County Council does really not arise; but as Mr. Paterson devoted a considerable part of his argument to that question, I think it right to add some remarks upon it.

As I have said, the knowledge of the animal's mischievous propensity need not always be personal knowledge of the owner himself. If he delegates the care of his business or the care and control of the animal to others or the animal is itself used in connection with the business, the master may properly be held to have such knowledge: see *Applebee* v. *Percy.* (4) In *Stiles* v. *Cardiff Steam Navigation Co.* (5), on the evidence, it was held that the knowledge of some servants of the defendants, a corporation, was not sufficient to attribute the knowledge to the defendants; but the Court in that case certainly indicate that if there were some one on the premises

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(1) 5 C. & P. 1.

(2) [1914] 1 K. B. 629.

(3) L. R. 2 C. P. 1.

(4) L. R. 9 C. P. 647.

(5) 33 L. J. (Q. B.) 310.

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appointed to control the business of the defendants it would have been sufficient to show knowledge in that person having control of the dog to affect the employer. The question being according to Blackburn J. (1): "whether they were persons who had control of the yard, or of the dog, or of the business, so as to be proper persons to receive notice for the Company." In *Baldwin* v. *Casella* (2), it was held, on the evidence, that the defendant had appointed his servant to control the defendant's dog, and, therefore, as Bramwell B. said (3): "The defendant has appointed his coachman to that duty; the coachman knew of the mischievous propensities of the dog; and his knowledge is the knowledge of the master."

In this matter the present case seems to me on this head to fall rather within *Stiles* v. *Cardiff Steam Navigation Co.* (4), than *Baldwin* v. *Casella* (2); that is to say, there is no evidence that the London County Council appointed the school-keeper to have control of the dog for the purposes of the London County Council.

In nearly all these cases, other than *North* v. *Wood* (5), the owner or keeper of the dog was the employer, but the two questions of keeping and scienter are different. I can conceive a case where although the dog was owned by the school-keeper, his employer may have in terms required him to keep a dog in order to protect the property of the employer. In such a case the keeper of the dog would be the servant, but the knowledge of the mischievous tendencies of the dog might be imputed to the employer since the servant's dog was on the premises for the employer's purposes. In such a case, difficult questions of liability might arise; but the present is not such a one: Not only, that is to say, is the dog not owned or kept by the London County Council, but it is not owned or kept by the school-keeper for the purposes of the London County Council. Mere exemption of dogs and cats from the prohibition to keep other animals mentioned in the regulation, coupled with the obligation to keep the dog under control, is far from imposing an obligation upon the school-keeper to have a dog at all or to keep it for the purposes of his employers. It is at most a concession and licence to him if he wishes to keep a dog.

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(1) 33 L. J. (Q. B.) 310, 312.
(2) L. R. 7 Ex. 325.
(3) L. R. 7 Ex. 326.
(4) 33 L. J. (Q. B.) 310.
(5) [1914] 1 K. B. 629.

For both these reasons therefore, because the dog is not either owned or kept by the defendants, and because in the circumstances of this case it is not right to impute to the defendants the knowledge of the dog's nature possessed by the school-keeper, I am of opinion that the plaintiff cannot hope to bring home to the defendants any liability except one founded upon negligence. Whether such a liability sounding in negligence could or could not prima facie be established it is unnecessary to discuss, because I agree with the county court judge and the Divisional Court that if the action be founded upon the responsibility of the defendants for the negligence of their servant, the school-keeper, the defendants have a complete defence in common employment.

*Appeal dismissed.*

Solicitors for the plaintiff: *Darracott Seymour & Co.*

Solicitor for the defendants: *Solicitor to the London County Council.*

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*Oct.* 3, 4, 20.

# MAPLE FLOCK COMPANY, LIMITED *v.* UNIVERSAL FURNITURE PRODUCTS (WEMBLEY), LIMITED.

[1932. M. No. 1997.]

*Sale of goods—Rag flock—Contract for delivery by instalments—Delivery of alleged defective instalment—Whether repudiation of whole contract by seller—Refusal of buyer to take further instalments—Breach of contract by buyer—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 31, *sub-s.* 2.

The Sale of Goods Act, 1893, s. 31, sub-s. 2, provides: "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated": *Held,* by the Court of Appeal, that, in applying the sub-section to a particular case, the main tests to be considered are, first, the quantitative ratio which the breach bears to the contract as a whole, and, secondly, the degree of probability that such a breach will be repeated.

A contract in writing was entered into between the plaintiffs and the defendants for the sale by the former to the latter of 100 tons of rag flock to be delivered in three loads of 1½ tons each per week as required, and the weekly deliveries to be separately paid for, it being stipulated that there should be a written guarantee that all flock supplied should conform to Government standard. By statute the Government standard was that of not more than 30 parts of chlorine in 100,000 parts of flock, and it was made a penal offence to use flock not conforming thereto. The sixteenth load delivered was duly accepted and used, and, after two further loads had been delivered, the defendants notified the plaintiffs that a sample drawn from the sixteenth load had been analysed and showed a contamination of 250 parts of chlorine, and the defendants claimed to rescind the contract. During ensuing negotiations two more deliveries were taken, but the defendants adhered to their claim to rescind and refused to accept any further deliveries. The plaintiffs thereupon brought an action against the defendants for damages for breach of contract by the latter in so refusing. The defendants alleged, in defence, that the plaintiffs by making the defective delivery had repudiated the whole contract, whereby the defendants were not obliged to accept further deliveries. It was found at the trial that the plaintiffs' business was well conducted, and that the contamination complained of by the defendants was extraordinary.

*Held,* by the Court of Appeal, that in these circumstances the plaintiffs' breach of the contract was not, within the meaning of the Sale of Goods Act, 1893, s. 31, sub-s. 2, a repudiation of the whole contract, that the defendants' refusal of further deliveries was a breach by them of the contract, and that the plaintiffs were entitled to judgment on their claim in the action.

*Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884) 9 App. Cas. 434; *Millars' Karri and Jarrah Company* (1902) v. *Weddel, Turner & Co.* (1908) 14 Com. Cas. 25; *Robert A. Munro & Co., Ld.* v. *Meyer* [1930] 2 K. B. 312; and *Taylor* v. *Oakes Roncoroni & Co.* (1922) 27 Com. Cas. 261, principles applied.

APPEAL from the judgment of du Parcq J., at the trial of the action by him without a jury.

The plaintiffs, the Maple Flock Company, Ld., were manufacturers of rag flock, and the defendants, the Universal Furniture Products (Wembley), Ld., were manufacturers of furniture and bedding, for which they used such flock. On March 14, 1932, a letter was written on behalf of the defendants to the plaintiffs, which contained the following order: "Terms 5% 7/14 days. 100 tons black linsey flock at 15*l.* 2*s.* 6*d.* per ton. To be delivered 3 loads per week as required. Written guarantee that all flock supplied under this contract will conform to the Government standard. Delivery free. Goods to be forwarded to Palace of Industry." On March 15, 1932, the plaintiffs wrote to the defendants a letter in reply, in which they stated: "We are obliged by your order . . . and herewith confirm our acceptance. We enclose you a separate letter of guarantee of purity"; and along with that letter they sent a letter of the same date in these terms: "We herewith give you guarantee that all flock manufactured by us conforms to Government standard . . . P.S. Separate guarantee is given on all invoices for flock sold." The weekly deliveries were to be separately paid for. A contract was thus entered into between the parties on these terms. A load of the flock consisted of 1½ tons or 60 bags. The Government standard was that of not more than 30 parts of chlorine in 100,000 parts of flock (1), and any person selling or using flock which did not conform to that standard was liable to a fine. (1)

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(1) See Rag Flock Act, 1911 (1 & 2 Geo. 5, c. 52), s. 1, sub-s. 1; and Rag Flock Regulations, 1912, dated June 8, 1912 (S. R. & O. 1912, No. 578), Art. 1.

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The plaintiffs at once commenced and continued to make deliveries of loads of flock of 1½ tons each to the defendants. On April 28, 1932, they made the sixteenth of these deliveries which the defendants accepted and used. On April 29 and May 2, 1932, the plaintiffs made further deliveries of 1½ tons each respectively. On the last-mentioned date (May 2) the defendants notified the plaintiffs at an interview that a sample drawn from the delivery of April 28, 1932, had been analysed and showed 250 parts of chlorine instead of the standard amount of not more than 30 parts; and on the same date they wrote to the plaintiffs stating that they had reluctantly come to the conclusion that the only way was for them to cancel the contract. On May 3, 1932, the plaintiffs wrote in reply to the defendants enclosing four certificates of analysis of their flock made during the preceding month, each of which showed much less than 30 parts of chlorine; stating that they had been advised that a sample which had been drawn from the delivery of April 28, 1932, contained only 18·8 parts of chlorine; and declaring that they would not accept cancellation of the contract. Further negotiations thereupon took place between the parties during which two more deliveries were tendered and taken, each of 1½ tons, but in the result the defendants continued to maintain that they had a right to cancel the contract and declined to receive further deliveries under it.

On June 15, 1932, the plaintiffs brought the present action against the defendants claiming damages for breach of contract in refusing further deliveries.

In their statement of claim the plaintiffs stated (para. 3) that under the contract the defendants were liable to take delivery for forty-five tons of the flock by May 21, 1932, but in breach thereof failed to take delivery of any quantity exceeding thirty tons, and by letters dated May 2, 1932, and subsequent dates respectively, refused to accept delivery of the flock in accordance with the contract and wrongfully repudiated the contract; and (para. 4) that by reason thereof the plaintiffs had suffered damage; and the plaintiffs claimed damages.

In their defence the defendants stated (para. 2) that by their letter dated March 15, 1932, the plaintiffs confirmed the defendant's order, which required a guarantee that all flock supplied would conform to the Government standard, and enclosed a separate letter of guarantee; (para. 3) that, as the plaintiffs well knew, the goods were required by the defendants for use for the purpose of making articles of furniture and the defendants relied upon the skill and judgment of the plaintiffs to supply flock which should be reasonably fit for the defendants' purpose, whereby there was an implied condition that the flock to be supplied by the plaintiffs would be reasonably fit for that purpose; and that in the alternative the flock was purchased by description whereby there was an implied condition that the flock would be of merchantable quality; (para. 5) that in breach of the said guarantee and implied conditions the 1½ tons of flock delivered on April 28, 1932, did not conform to the Government standard, and was not reasonably fit for its purpose and was not of merchantable quality; (para. 6) that by reason of these matters the plaintiffs repudiated the contract whereby the defendants were not obliged to accept any further deliveries from the plaintiffs; and (para. 7) that by s. 1 of the Rag Flock Act, 1911 (1), it was a penal offence to use for the purposes of making any article of upholstery or to have in possession flock manufactured from rags intended to be used for that purpose unless that flock conformed to the prescribed standard of cleanliness; and that after the date of the said defective delivery the defendants were not obliged to accept further deliveries in that they would thereby have become liable to criminal prosecution.

The action was tried by du Parcq J., without a jury, on March 30 and 31, 1933, and on the latter date the learned Judge gave judgment for the defendants with costs.

The nature of the evidence given at the trial, the findings of fact of the Judge, and the grounds of his decision are set forth below in the judgment of the Court of Appeal.

The plaintiffs appealed. The appeal was heard on October 3, 4, 1933.

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(1) See note (1) ante, p. 149.

*Beyfus K.C.* and *Roger Willis* for the plaintiffs, appellants.

*J. W. Morris* for the defendants, respondents.

The points discussed and the authorities cited in the course of the argument appear from the judgment of the Court of Appeal.

Oct. 20. The judgment of the Court (LORD HEWART C.J., LORD WRIGHT, and SLESSER L.J.) was delivered as follows:

LORD HEWART C.J. The judgment which I am about to read is the judgment of the whole Court.

The appellant company are manufacturers of rag flock, and the respondents are manufacturers of furniture and bedding for which they use such flock. The action was brought by the appellants for breach by the respondents of a contract in writing, dated March 14, 1932, for the sale by the appellants to the respondents of 100 tons of black lindsey flock at 15*l.* 2*s.* 6*d.* per ton, to be delivered in three loads per week as required. It was further stipulated that there should be a written guarantee that all flock supplied under the contract should conform to the Government standard. The load was 1½ tons or 60 bags. The Government standard was that required under the Rag Flock Act, 1911, which had been fixed by regulation under the Act at not more than 30 parts of chlorine in 100,000 parts of flock. The Act made it a penal offence punishable by fine for any person (inter alia) to sell or have in his possession for sale or use or to use flock not conforming to that standard. A person charged under the Act might, however, if he could prove that he bought it from some one resident in the United Kingdom under a warranty that it complied with the Government standard, and that he had taken reasonable steps to ascertain and did in fact believe in the accuracy of the warranty, bring the seller before the Court by information and transfer the burden of the offence to him. (1)

The appellant company duly gave a written guarantee as required by the contract and deliveries were at once commenced and continued of 1½ tons each. The sixteenth of these deliveries was made on April 28, 1932, and, according to the respondent's evidence, was duly accepted and the stuff put into use; a further delivery was made on April 29, 1932, and another on May 2, 1932. On that latter date the respondents notified the appellants that a sample drawn from the delivery of April 28, 1932, had been analysed and showed a contamination of 250 parts of chlorine, instead of the maximum allowed by law of 30 parts. The respondents thereupon claimed to rescind the contract; the appellants protested, and some negotiations took place, during which two more deliveries were tendered and taken, each of 1½ tons. Eventually the respondents adhered to their claim that they were entitled to rescind, and the writ was issued by the appellants claiming damages on the ground that the refusal of the respondents to take further deliveries was wrongful.

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(1) See note (1) ante, p. 149.

No complaint is made in respect of the 15 deliveries made before April 28, 1932, or in respect of the four deliveries made after that date. The respondents made no claim for damages in respect of the delivery said to be defective, because it had all been used before the report was received on the sample. The learned Judge finds that the sample was taken in the usual way—namely, one handful drawn from one bag of the 60 bags which constituted the delivery, and he held that the respondents were entitled, applying the ordinary rules of probability, to say that such must be the condition of the whole or substantially the whole of that delivery of 1½ tons. On the other hand the appellants produced analyses of the flock they had in store from time to time, including an analysis dated April 29, 1932, all of which showed percentages of chlorine well below the Government maximum, though they could not identify any sample as drawn from the flock actually delivered to the respondents. In their evidence they described the process of manufacture by washing which they used. The learned Judge finds that it would be quite wrong to make any general criticism at all of the way in which the appellants conducted their business; he was very favourably impressed, he said, by the evidence of Mr. Jebb, who gave evidence for them; he seemed to the Judge a careful, scrupulous and

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honourable man. Mr. Jebb could give no explanation of so gross a degree of contamination and was disposed to think some mistake had been made as to the sample. The learned Judge, however, finding that the sample must be taken as a fair test of the delivery, held that the defendants, as prudent traders, could properly say to themselves, in regard to the defective delivery, "it might happen again." He nowhere finds that it was a reasonable inference that it would happen again. His conclusion appears to us to be that there was a mere possibility, not a reasonable probability, that it would happen again. On the contrary, he finds that the occurrence was a very extraordinary thing. We think that on the evidence, and the findings of the learned judge, the true inference of fact is that there was no reasonable probability of any such improper delivery being repeated under the contract.

The decision of this case depends on the true construction and application of s. 31, sub-s. 2, of the Sale of Goods Act, 1893, which is in the following terms: "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated." That sub-section was based on decisions before the Act, and has been the subject of decisions since the Act. A contract for the sale of goods by instalments is a single contract, not a complex of as many contracts as there are instalments under it. The law might have been determined in the sense that any breach of condition in respect of any one or more instalments would entitle the party aggrieved to claim that the contract has been repudiated as a whole; or on the other hand the law as established might have been that any breach, however serious, in respect of one or more instalments should not have consequences extending beyond the particular instalment or instalments or affecting the contract as a whole. The sub-section, however, which deals equally with breaches either by the buyer or the seller, requires the Court to decide on the merits of the particular case what effect, if any, the breach or breaches should have on the contract as a whole.

The language of the Act is substantially based on the language used by Lord Selborne L.C. in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1), where he said: "I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr* (2), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part." (3) In *Freeth* v. *Burr* (2) Lord Coleridge C.J. stated the true question to be: "Whether the acts and conduct of the party evince an intention no longer to be bound by the contract." (4) These were both cases of breach by the buyer in not making punctual payment, and in each case it was clear that the buyer had some justification for the course he took. The case of breach by the seller in making defective deliveries may raise different questions. Lord Selborne in the passage above quoted did not refer to any question of intention, but said that what is to be examined is the conduct of the party. Lord Coleridge in *Freeth* v. *Burr* (2), citing *Hoare* v. *Rennie* (5), on the question of a seller's breach, states thus one aspect of the rule: "Where by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract." (6) In other words, the true test will generally be, not the subjective mental state of the defaulting party, but the objective test of the relation in fact of the default to the whole purpose of the contract.

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(1) 9 App. Cas. 434.
(2) (1874) L. R. 9 C. P. 208.
(3) 9 App. Cas. 434, 438.
(4) L. R. 9 C. P. 208, 213.
(5) (1859) 5 H. & N. 19.
(6) L. R. 9 C. P. 208, 214.

Since the Act, the sub-section has been discussed by a Divisional Court in *Millars' Karri and Jarrah Company* (1902) v. *Weddel, Turner & Co.* (1), where the contract being for 1100 pieces of timber, the first instalment of 750 pieces was rejected by the buyers; an arbitrator awarded "that the said shipment was, and is, so far from complying with the requirements of the said contract as to entitle the buyers to repudiate and to rescind the whole contract and to refuse to accept the said shipment and all further shipments under the said contract." The Court upheld the award. Bigham J. thus stated what in his opinion was the true test. "Thus, if the breach is of such a kind, or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. If, for instance, a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what may happen; he can at once cancel the contract and rid himself of the difficulty." (2) Walton J. concurred.

This ruling was more recently applied in *Robert A. Munro & Co.* v. *Meyer* (3), where under a contract for the sale of 1500 tons of bone meal, 611 tons were delivered which were seriously adulterated. The sellers were middlemen, who relied on their suppliers, the manufacturers, for correct delivery; when the buyers discovered that the deliveries did not conform to the contract they claimed that they were entitled to treat the whole contract as repudiated by the sellers. It was held that they were right in so claiming, on the ground that "in such a case as this, where there is a persistent breach, deliberate so far as the manufacturers are concerned, continuing for nearly one-half of the total contract quantity, the buyer, if he ascertains in time what the position is, ought to be entitled to say that he will not take the risk of having put upon him further deliveries of this character." (1) On the other hand in *Taylor* v. *Oakes Roncoroni & Co.* (2), Greer J., as he then was, and the Court of Appeal, declined to hold that the buyers were entitled to refuse to go on with the contract, but held that the breach was a severable breach, as it was a case "where the instalment delivered failed in a slight but appreciable degree to come up to the standard required by the contract description."

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(1) 14 Com. Cas. 25.
(2) Ibid. 29.
(3) [1930] 2 K. B. 312.

With the help of these authorities we deduce that the main tests to be considered in applying the sub-section to the present case are, first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such a breach will be repeated. On the first point, the delivery complained of amounts to no more than 1½ tons out of a contract for 100 tons. On the second point, our conclusion is that the chance of the breach being repeated is practically negligible. We assume that the sample found defective fairly represents the bulk; but bearing in mind the judge's finding that the breach was extraordinary and that the appellant's business was carefully conducted, bearing in mind also that the appellants were warned, and bearing in mind that the delivery complained of was an isolated instance out of 20 satisfactory deliveries actually made both before and after the instalment objected to, we hold that it cannot reasonably be inferred that similar breaches would occur in regard to subsequent deliveries. Indeed, we do not understand that the learned Judge came to any different conclusion. He seems, however, to have decided against the appellants on a third and separate ground, that is, that a delivery not satisfying the Government requirements would or

(1) [1930] 2 K. B. 331, per Wright J.

(2) 27 Com. Cas. 261.

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might lead to the respondents being prosecuted under the Act. Though we think he exaggerates the likelihood of the respondents in such a case being held responsible, we do not wish to underrate the gravity to the respondents of their being even prosecuted. But we cannot follow the Judge's reasoning that the bare possibility, however remote, of this happening would justify the respondents in rescinding in this case. There may indeed be such cases, as also cases where the consequences of a single breach of contract may be so serious as to involve a frustration of the contract and justify rescission, or furthermore, the contract might contain an express condition that a breach would justify rescission, in which case effect would be given to such a condition by the Court. But none of these circumstances can be predicated of this case. We think the deciding factor here is the extreme improbability of the breach being repeated, and on that ground, and on the isolated and limited character of the breach complained of, there was, in our judgment, no sufficient justification to entitle the respondents to refuse further deliveries as they did.

The appeal must accordingly be allowed and judgment entered for the appellants, with costs here and below, for damages for their breach of contract in refusing further deliveries. (1)

Solicitor for appellants: *Edward D. K. Busby.*
Solicitors for respondents: *Churchill, Clapham & Co.*

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(1) The Court also made an order for an inquiry as to damages before an official referee, unless the parties should agree upon an arbitrator.

J. R.

# THE KING *v.* WESTMINSTER ASSESSMENT COMMITTEE.

C. A.
1933
*Oct.* 24.

## *Ex parte* BLACK.

*Rates and Rating—Metropolis—Valuation—Provisional List—Alteration of entries—Power of Assessment Committee in absence of objection—Valuation (Metropolis) Act,* 1869 (32 *&* 33 *Vict. c.* 67), *s.* 47, *sub-ss.* 1, 7.

In May, 1932, a double flat which had formerly been occupied as a single flat was divided by the owner into two flats and let to separate tenants and was known as Nos. 3 and 4, Duke Street Mansions. In October, 1932, a provisional valuation list was made which included the two flats. That list showed No. 3 to be rated at 169*l.* gross and 137*l.* rateable value and No. 4 at 146*l.* and 118*l.* rateable value. The owner pursuant to s. 47, sub-s. 4, of the Valuation (Metropolis) Act, 1869, gave notice of objection to the provisional list so far as it related to No. 3, but he gave no notice of objection in respect of No. 4. The owner's representative attended and objected that the figures entered opposite Nos. 3 and 4 had by accident been transposed. The assessment committee amended the provisional valuation list with the result that the valuation of the two flats was increased by 58*l.* The owner objected that no notice had been given him that the valuation of No. 4 would be considered by the assessment committee. The Divisional Court held that under sub-s. 7 of s. 47 of the Act of 1869 the assessment committee had power to alter entries in the provisional list even where no objection had been made to those entries.

On appeal:—

*Held,* on the facts, that the two flats, Nos. 3 and 4, must be regarded as one hereditament, and that being so, all the requirements of s. 47 of the Act of 1869 had been duly complied with.

*Royal Agricultural Hall Co.* v. *Islington Assessment Committee* [1918] A. C. 525 distinguished.

Decision of the Divisional Court [1933] 2 K. B. 482 affirmed, but on different grounds.

APPEAL from an order of a Divisional Court (1) discharging a rule nisi for certiorari.

In affidavits filed in the proceedings it was stated that the applicant, Robert Wilson Black, was the owner of the premises, No. 70, Duke Street, Westminster, a part of which consisted of flats. Formerly, Nos. 3 and 4, Duke Street Mansions (part of 70, Duke Street), were let to and occupied as a double flat by one tenant. That double flat was then

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rated at 240*l.* gross and 195*l.* rateable value. When that tenancy came to an end Mr. Black re-converted the double flat into two flats and let them as two separate flats. In October, 1932, Mr. Black received from the clerk to the Westminster Assessment Authority a notice under s. 47 of the Valuation (Metropolis) Act, 1869, that the Westminster Rating Authority had sent in a provisional list which included Nos. 3 and 4 Duke Street Mansions. That list showed No. 3 to be rated at 169*l.* gross and 137*l.* rateable value, and No. 4 at 146*l.* gross and 118*l.* rateable value.

Mr. Black, pursuant to s. 47, sub-s. 4, of the Valuation (Metropolis) Act, 1869, gave notice of objection to the provisional list in so far as it related to No. 3, Duke Street Mansions, but he gave no notice of objection in respect of No. 4, Duke Street Mansions.

At the hearing of the objections on November 30, 1932, Mr. Black's representative gave particulars of the accommodation of Nos. 3 and 4, Duke Street Mansions and stated his objections to the amount of the gross value proposed for No. 3. The valuer to the rating authority informed the assessment committee that it appeared that an error had been made in the provisional list, and that the gross and rateable values of No. 3, Duke Street Mansions had apparently been inserted for No. 4, and the values of No. 4 had been inserted for No. 3. The valuer asked the assessment committee to alter the list by transposing the values, but the assessment committee decided to adjourn the hearing so that the particulars of the two flats could be verified.

At the hearing on December 14, 1932, the valuer made recommendations which were accepted by the committee, and No. 3, Duke Street Mansions was assessed at 146*l.* gross and 118*l.* rateable value, and No. 4 at 169*l.* gross and 137*l.* rateable value, and the list was altered accordingly.

An order nisi for certiorari was obtained at the instance of Mr. Black to quash the decision of the Westminster Assessment Committee dated December 14, 1932, whereby the gross value of No. 4, Duke Street Mansions was increased from 146*l.* to 169*l.* The grounds of the order were, that :

(*a*) no objection had been made by Mr. Black to the provisional list in so far as it related to No. 4, Duke Street Mansions;

(*b*) no notice had been served on Mr. Black that the assessment committee intended to consider the list in so far as it related to No. 4, Duke Street to No. 4, Duke Street Mansions;

(*c*) no opportunity was given to Mr. Black by the assessment committee to place his case before them with reference to an alteration in the list in so far as it related to No. 4;

(*d*) the assessment committee had no authority to alter the value inserted in the valuation list by the rating authority, unless an objection had been made to that value; alternatively,

(*e*) the assessment committee had no authority to alter the value inserted in the list by the rating authority, unless they first had given notice to the occupier that they intended to consider such value and/or unless they had first given the occupier an opportunity to present his case.

On an appeal the Divisional Court (Lord Hewart C.J., Avory and Humphreys JJ.) quashed the order nisi on the ground that under sub-s. 7 of s. 47 of the Valuation (Metropolis) Act, 1869, an assessment committee had power to alter entries in the provisional list, even where no objection had been made to those entries.

Mr. Black appealed. The appeal was heard on October 24, 1933.

*Sir Walter Greaves-Lord K.C.* and *H. J. Astell Burt* for the appellant repeated the arguments used by them in the Divisional Court.

*Montgomery K.C.* and *A. M. Trustram Eve* for the respondents were not called upon.

LORD HANWORTH M.R. This appeal fails. At first sight it would seem that an interesting point might be raised—and indeed Sir Walter Greaves-Lord in presenting his argument opened the case as if that point was raised in this case. But for reasons which I will develop in a moment I do not think that is so. The case is one which really turns upon the facts.

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COMMITTEE.
BLACK,
*Ex parte.*

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M.R.

The appellant, Mr. Black, is the owner of certain premises known as Duke Street Mansions. Before 1930 these premises consisted of one big flat on the same floor. On May 1, 1930, the premises became vacant and then the big flat was remodelled and made into two flats, and known thereafter as Nos. 3 and 4, Duke Street Mansions. They had been altered before April, 1932. Both flats were let, with the result that there were two occupants of those two severed portions of what had been one big flat.

In consequence of that change the rating authority took action—and the documents that we have before us show this: that on October 29, 1932, the clerk to the assessment committee gave notice to Mr. Black, the appellant, "that the rating authority of the parish of the City of Westminster had sent to the City of Westminster assessment committee a provisional valuation list in which the above-named hereditament has been inserted."

Now the above-named hereditament was 3 and 4, Duke Street Mansions. That was the new name of the old big flat. The letter goes on: "On the other side I forward a copy of so much of the provisional list as relates to the said hereditament." The provisional valuation list contains the following particulars: the hereditament, the name of the owner, Mr. Black, and the situation of the property is given, and the particulars in the valuation list now in force, 240*l.* being given as the gross value and 197*l.* as the net annual value. Then follows an estimate by the rating authority, and by severing the original big flat into two, 169*l.* gross and 146*l.* gross are put for each of the portions, the net annual value of those being 137*l.* and 118*l.*

Mr. Black was not dissatisfied with what had been done in respect of No. 4 because the valuation of No. 4 at 146*l.* gross was satisfactory in his view, and his representatives on November 7 wrote as follows: "We are in receipt of your notice of the proposed assessment on the above property and on behalf of the owner—Mr. R. W. Black, J.P.—we give you formal notice of objection to the proposed figures. We think that there must be some mistake in this matter as the flat has, we understand, been assessed at gross 169*l.* net 137*l.*, whereas the rent inclusive of general and water rate is only 200*l.* per annum. It will therefore be seen that allowance has not been made for general and water rates payable by the landlord, and in addition to which the landlord is of course responsible for many other services. In our opinion the gross value should not in any case exceed 125*l.*" That is headed: "3, Duke Street Mansions." To that there was the response that the hearing of this objection would be taken on November 30. That notice was given on November 23, and it was headed "re 70, Duke Street, 3, Duke Street Mansions." 70, Duke Street, is the name or situation of the property. The usual intimation is given as to bringing the documents with which to deal with the objection.

We have been told in evidence, which is accepted, that the hearing began on November 30, when Mr. Black's representative stated his objections, and "On it being admitted by Captain Bourdas, the valuer to the City Council, that neither he, nor any member of his staff had inspected 3, Duke Street Mansions, the assessment committee decided to refer the matter back to the valuation committee for further consideration and to enable the valuer to inspect the said flat." It was so inspected and we have the information given to us in a further affidavit by Mr. Parker Morris, that Mr. Sydney Black attended. They met on the premises and it was then discovered that a mistake had been made, that No. 3, Duke Street Mansions was the smaller of the flats and that there had been a mistake as to the allocation of the figures to the respective flats.

Then further notice is given that the committee will "hear further your objection on the 14th December." On December 14 the hearing took place. "At the said hearing the valuer to the Westminster City Council assented to the reduction in the assessment of 3, Duke Street Mansions from 169*l.* to 146*l.*; but he requested the assessment committee to increase the assessment of 4, Duke Street Mansions on the ground that he had made a mistake. My representative strongly objected to the committee considering the assessment of 4, Duke Street Mansions. He pointed out that I had not objected to that

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assessment; that no notice had been given that the assessment of Number 4 would be considered by the assessment committee; and that he had no authority or instructions from me (as was the fact) to deal with the assessment of No. 4, Duke Street Mansions. Notwithstanding the objections of my representative the said assessment committee decided to consider the assessment of No. 4, Duke Street Mansions, and ordered the gross value of the assessment of No. 4, Duke Street Mansions to be increased from 146*l.* to 169*l.*"

Then comes the provisional valuation list as settled by the assessment committee, and that shows that upon these same premises, of which the particulars of the valuation list were now in force, they had now transposed the figures in relation to Nos. 3 and 4. Against No. 3 they put the higher valuation, with the total result that they had made a variation in the rateable value of these two hereditaments combined in the valuation list of a sum of 58*l.* That was the result.

Now it is said that whether it was a mistake or not, the assessment committee had no such power: that the objection that they had got to hear was an objection in respect of No. 3, Duke Street Mansions, and that their jurisdiction was limited to hearing that objection.

Attention has been called—quite rightly—to the terms of s. 47 of the Valuation (Metropolis) Act, 1869, which are as follows: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect." The rating authority—who now represent the overseers—shall send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced, of such hereditament. Then various provisions are inserted requiring a copy to be sent to the occupier, and so on. Then, sub-s. 4: "An objection may be made to any such provisional list by the said occupier . . . ." and sub-s. 6: "The committee shall hear and determine on the objection in the same manner as if it were an objection to a valuation list, and may make such order as they think just."

Now what was the provisional list which was the subject-matter brought before the assessment committee? What was the provisional list which had been sent to the assessment committee by the rating authority? It was a provisional list in respect of Nos. 3 and 4, Duke Street Mansions. The totality which was the subject-matter of the change was Nos. 3 and 4, and the upshot of the determination of the assessment committee related to Nos. 3 and 4, and whereas the big flat (as I will call it) had now by the change "from any cause" been increased in value so the assessment committee ultimately determined that there had been an increase in value, namely, by a sum of 58*l.*; and the ultimate result is that the provisional list covers these tenements or premises, now increased in value, which originally stood in the form which I have already indicated in the rating books, and have now been altered by the terms of the provisional list.

But it is said that the objection taken by the owner is what determines the jurisdiction of the assessment committee. I think that an examination of the sub-sections clearly indicates that what they have to consider is an objection to the provisional list. An objection has been made to such provisional list, and by sub-s. 6 "the committee shall hear and determine on the objection in the same manner as if it were an objection to a valuation list, and may make such order as they think just."

In the course of the argument I said to Sir Walter Greaves-Lord that it is not the change that is made by the landlord or the owner of the property that puts the rating authority in motion. It is true that if some decrease in value has occurred, so that the property owner would wish to reap the advantage of it, he could ask for a change. But the motion is derived from the rating authority, who have the power where there has been a change to make and send to the assessment committee a provisional list. One therefore has to look at the property owner not as the dominus of the situation but rather as the person who, if and when the rating authority moves, has the power to enter an objection.

But when that objection has been entered what the committee have to determine upon is the subject-matter which has raised the objection, and that is the provisional list.

Application was made for a certiorari before the Divisional Court on certain grounds which are set out in the order which was then made.

Now when one considers the point which is raised, that the jurisdiction of the assessment committee is limited by the terms of the objection, it is plain that that fails. It fails, as I have already pointed out, by reason of the terms of s. 47, and also upon the facts when one looks at what it was that the rating authority set out to do; and therefore it appears to me that this appeal cannot be sustained.

But it is objected that the Divisional Court decided the matter on a different ground. I think that is so. The ground on which they decided it was founded upon the case of *Royal Agricultural Hall Co.* v. *Islington Assessment Committee.* (1) I wish to say that with regard to that authority I should like to have further argument and give further consideration to it before I accepted the view taken by the Divisional Court upon it. I think there is a good deal to be said for the view that there has been a misapprehension by the Divisional Court as to the effect of that decision in the House of Lords. I desire to say that by way of caution, because I am dealing with this appeal on grounds which do not require me to go into the grounds stated by the Divisional Court; and I must not be understood as—at any rate, at present and without further argument—accepting the view which commended itself to the Divisional Court.

But for the reasons which I have given I think the matter is plain upon the facts and that the case really falls to pieces when one examines what those facts are.

The appeal must be dismissed. With regard to the costs it appears to me when rightly understood there is no necessity for going into the so-called interesting point which it was said was decided, or ought to be decided, in this case. But nevertheless this is a case in which the appellant has wholly misapprehended his rights and the circumstances giving rise to what he claims to be his rights, and the appeal must be dismissed with costs.

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(1) [1918] A. C. 525.

Slesser L.J. I agree. This is one of those unfortunate cases where the argument in the Court below and the judgment of the Court have all proceeded upon assumptions which have proved on inquiry to have no satisfactory foundation. The erroneous assumptions to which I have referred are these: that No. 4, Duke Street Mansions was, for the purposes of this case, a separate hereditament, and that any alteration in the assessment of No. 4, Duke Street Mansions was to be treated as an alteration of the assessment of a separate hereditament.

As I understand the matter the proper way of looking at this case is to regard No. 3 and No. 4, Duke Street Mansions as one hereditament. There is no doubt at all that at the time of the last quinquennial valuation No. 3 and No. 4, Duke Street Mansions appeared in the valuation list as one hereditament, and the definition of a hereditament in s. 4 of the Valuation (Metropolis) Act, 1869, is this: "The term 'hereditament' means any lands, tenements, hereditaments, and property which are liable to any rate or tax in respect of which the valuation list is by this Act made conclusive."

By s. 45 of the same Act: "The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act."

Now, at the time of the commencement of these proceedings under s. 47 the hereditament was a combined flat, Nos. 3 and 4, whether partitioned or not partitioned. As my Lord has pointed out, although there is power under s. 28 of the Union Assessment Committee Act, 1862 (the proviso there still applies to London, although the rest of that section does not apply) in appropriate cases for the authority to partition property by reason of an alteration in the occupation of the property as follows, i.e.: "Provided always, that where by reason of any alteration in the occupation of any property included in such list such property has become liable to be rated in parts not mentioned in such list as rateable hereditaments and separately rated therein, such parts may, where a supplemental valuation list showing the annual rateable value of such parts has not been approved and delivered as herein-before required, and whether such list has or has not been made, be rated according to such amounts as shall be fair apportioned parts of the annual rateable value appearing in such valuation list in force as aforesaid of the hereditaments out of which such parts have been constituted," there is no suggestion here that any such apportionment under s. 28 of the Act of 1862 ever took place.

Passing to s. 47 of the Valuation (Metropolis) Act, 1869, that says: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value," then certain provisions are to take effect. That hereditament is, is my opinion, Nos. 3 and 4, Duke Street Mansions combined.

Further, sub-s. 10 provides that the provisional list during the time it is in force "shall be deemed to form part of the valuation list for the time being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament,"—again, Nos. 3 and 4, Duke Street Mansions.

Finally, when we come to look at the provisional valuation list which was ultimately compiled we find that the assessment committee acted in accordance with those requirements, because after analysing the values of Nos. 4 and 5, at the end they state the combined rateable value, which they say will be an increase in value of 58*l.*; and I regard that provisional valuation list as a variation in the value of the combined hereditament of Nos. 3 and 4, Duke Street Mansions.

Now if that be so it is clear to my mind that Sir Walter Greaves-Lord's objections must fail. First of all, there was an objection made under sub-s. 6 to a proposed alteration in the valuation list of that combined hereditament. Secondly, the committee did hear and determine that particular matter. It is true that they found that an error had been committed and they adjusted that error. Sub-s. 6 goes on to say that the committee shall hear and determine on the objection in the same manner as if it were an objection to a valuation list, and may make such order as they think just; and I think that having had before them the objection to the combined valuation—which it is true dealt with a part of the hereditament—they did determine and make such order as they thought just, that is to say, they increased the valuation by 58*l.* and, as Sir Walter Greaves-Lord admits, without any complaint at all. But neither the ground on which the rule is sought nor the judgment of the Divisional Court proceeds on that assumption. The Court treat No. 3 as a separate hereditament, and on that false assumption apply the authority, or, what they believe to be the authority, of a case in the House of Lords, the *Royal Agricultural Hall Co.* v. *Islington Assessment Committee.* (1)

Now I decline altogether to express an opinion as to the application of that decision to the present case, and for this reason: that the present case does not—for the reasons I have indicated—raise the questions which the Divisional Court had to consider. There will be sufficient time to consider the very difficult matters which Sir Walter Greaves-Lord has dealt with when a case appropriate for their consideration comes before the Court. I follow my Lord, therefore, in declining to express any opinion whether the Divisional Court were or were not right in deeming themselves to be bound by the decision of the House of Lords.

I also share at the moment some of the difficulties which were expressed during the argument by my Lords. However that may be, I think the whole question does not arise. Nothing that this Court is saying now, as I understand, is to be taken as an approval of the Divisional Court in this case, because as I understand it this appeal is dismissed on the ground that this being one hereditament throughout all the requirements of s. 47 of the Act of 1869 have been complied with.

(1) [1918] A. C. 525.

ROMER L.J. I agree that this appeal fails and for this reason: Sect. 47 of the Valuation (Metropolis) Act, 1869, only applies where there is an alteration in the value of some hereditament appearing in the valuation list. Where the rating authority comes to the conclusion that one of such hereditaments has become increased or reduced in value then they may prepare a provisional list, and by sub-s. 1 of the section they must insert in that provisional list the gross and rateable value, as so increased or reduced, of such hereditament.

Before October, 1932, there was in the valuation list a hereditament known as Nos. 3 and 4, Duke Street Mansions: that hereditament appeared in the valuation list as of a gross value of 240*l.* and a net annual value of 197*l.* The rating authority formed the opinion that the hereditament had increased in value, and accordingly they prepared a provisional list, in which they indicated that in their opinion the value of the hereditament had increased to the figure of 315*l.* gross and to the figure of 255*l.* net. That is the effect of their provisional list. But unfortunately in the provisional list they did what was quite unnecessary, they indicated the process of reasoning by which they arrived at the conclusion I have expressed and they indicated that their reason for arriving at the net figure of 255*l.* was that in their opinion the rateable value of one flat, No. 4, was 118*l.*, and that of the other was 137*l.* The net result, however, was that the rateable value of this hereditament was increased by 58*l.* Mr. Black is given by s. 47 of the Act of 1869 a right to object to the additional value in the provisional list. He did object, but, as I read his notice of objection, merely on the ground that No. 3 was not of the value which the rating authority had indicated that it was in their opinion, in fixing the total value of the whole hereditament. But the matter that was appealed against was the increase of 58*l.*, and that was the only matter with which the assessment committee could deal. They dealt with it in this way: they found that there had been an increase in the net rateable value of 58*l.*; but at the same time they discovered that the process of reasoning—which unfortunately was recorded in the provisional list—was erroneous (entirely by a mistake of the rating authority) and that the 58*l.* could be accounted for by a much larger increase in No. 4 than in No. 3. That being the ground of their decision it was clearly open to them under sub-s. 6 of s. 47 of the Act of 1869 to alter the provisional list so as to record the real grounds upon which the 58*l.* was in their opinion sustained.

For these reasons I am of opinion that this appeal should be dismissed.

I do not desire to add anything to what has been said by the other members of the Court as to the grounds expressed in the judgment of the members of the Divisional Court.

*Appeal dismissed.*

Solicitors for appellant: *Wedlake, Letts & Birds.*
Solicitors for respondents: *Allen & Son.*

W. I. C.

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## NIHALCHAND NAVALCHAND *v.* McMULLAN.

[1933. N. 1269.]

C. A.
1933
*Oct.* 2;
*Nov.* 7.

*Practice—Action by moneylenders—Moneylenders resident at Bombay—Specially endorsed writ—Claim to sign judgment in default of appearance—No statement on writ of plaintiffs being licensed moneylenders—R. S. C., Order* III., *r.* 10.

The plaintiffs brought proceedings by specially endorsed writ to recover the amount which became due on a promissory note dated June 24, 1932, on default in payment of an instalment, with interest at 3 per cent. per month from the date of default. The plaintiffs were moneylenders who were stated on the writ to reside at Bombay, and the figures of the promissory note were in rupees, but it did not appear where the plaintiffs carried on business. The defendant did not appear to the writ, but when the plaintiffs sought to sign judgment in default of appearance, judgment was not entered because the writ did not comply with Order III., r. 10.

Successive appeals by the plaintiffs were dismissed by the Master and Talbot J., on appeal.

*Held*, that in the absence of evidence to exclude the application of the Moneylenders Acts, the claim to enter judgment in default of appearance was rightly refused.

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NIHALCHAND NAVALCHAND v. McMULLAN.

APPEAL from Talbot J.

The statement of facts is taken from the judgment.

The action was commenced by a writ dated June 26, 1933. The statement of claim was specially endorsed upon it under Order III., r. 6, and stated that the claim arose upon default made in the payment of the fifth instalment due under a promissory note, dated June 24, 1932, by the terms of which, upon such a default, the whole amount of the promissory note at once became due, with interest at 3 per cent. per month on such amount from the date of default until payment in full. The figures of the promissory note were estimated in rupees, and in the result, the claim was for a balance of 900 rupees and interest from the date of default, namely 206.13 rupees. These sums together, by exchange into sterling, amounted to 84*l*. 2*s*. 10*d*. From the terms of the note and the interest charged, it would seem plain that the promissory note was given for money lent by a moneylender.

It does not appear where the contract was made, but it is stated on the writ that the plaintiffs reside at Lower Colaba, Bombay, in the Empire of India. The writ bears a statement that it was served "by posting a true copy thereof at the Post Office, Lombard Street, E.C.3, in a prepaid registered envelope, addressed to the defendant at "The Retreat," Salisbury Road, Carshalton, Surrey, pursuant to agreement for service dated 24th June, 1932."

The defendant did not appear to the writ, and the plaintiffs proceeded to sign judgment in default of appearance on July 10, 1933. But the judgment was not entered, by reason of a note and a direction made upon it on July 17: "Judgment not entered owing to the fact that writ does not comply with the terms of Order III., rule 10." That rule requires that in actions by a moneylender the fact that the plaintiff is a licensed moneylender, and, where the writ is specially indorsed, as this is, certain other details as to the loan, the rate of interest, the terms of repayment, and the like, shall be stated.

The plaintiffs appealed to the Master against the refusal to enter the judgment, and the Master dismissed the appeal.

From the Master, the plaintiffs appealed to Talbot J., who confirmed the Master.

The plaintiffs appealed. The appeal was heard on October 2 and judgment given on November 7.

*H. J. Wallington* for the appellants. The refusal to enter judgment was due to a direction issued to the writ and judgment department by the Senior Master headed " Actions by foreign (including Indian and Irish) moneylenders." He there directed that " Judgment in default should not be signed in these actions unless the indorsement on the writ complies with Order III., r. 10, by setting out the particulars required by that rule." That direction was based on Order III., r. 10, which was a rule made by reason of the Moneylenders Act, 1927, which provides for the licensing of moneylenders. The special matter not contained in the writ here is the statement that the plaintiffs were licensed moneylenders; but as a moneylender carrying on business abroad cannot be licensed under the Act, Order III., r. 10 (1), can have no application in this case. There is no definition of a moneylender in the Act of 1927, but by s. 19, sub-s. 2, the Act is to be construed as one with the Moneylenders Act, 1900, which by s. 6 provides that " the expression 'moneylender' . . . . shall include every person whose business is that of moneylending, or who advertises or announces himself or holds himself out in any way as carrying on that business " with certain immaterial exceptions. Sect. 2 of the Act of 1900 which provides for registration of " a moneylender as defined by this Act " can only have applied to a moneylender carrying on business in England and therefore a moneylender as defined in s. 6 must be similarly limited and s. 1 cannot apply to foreign moneylenders. Order III., r. 10, is therefore impossible of performance by a foreign moneylender and cannot have been intended to apply to him. Unless the Moneylenders Acts were intended to apply to foreign moneylenders the rule made to comply with the Acts can have no application to him. The rule deals entirely with the requirements of the English statutes relating to moneylenders and the scope of the Moneylenders Acts is confined to England : *Shaik Sahied* v. *Sockalingam Chettiar* (1) ; *Shrichand & Co.* v. *Lacon.* (2) A person entitled to come to the English Courts to enforce his rights cannot be excluded from doing so by any rule of Court.

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(1) Order III., r. 10: " In actions by a moneylender . . . . for the recovery of money lent by the moneylender . . . . , the indorsement on the writ shall state, in addition to any other particulars, the fact that the plaintiff . . . . is a licensed moneylender, and if the writ be specially indorsed under Rule 6 of this Order shall state in addition to any other particulars—(*a*) The fact that the plaintiff . . . . is a licensed moneylender; . . . . "

[LORD HANWORTH M.R. The Master's direction relates only to signing judgment in default ; it will not prevent plaintiffs from proceeding by motion for judgment.]

The provision in Order III., r. 10, for stating on the writ that the moneylender suing is a licensed moneylender is not limited to specially endorsed writs. The plaintiffs are seeking to proceed under Order XIII., r. 3, and it is contended that they are entitled to do so.

*Cur. adv. vult.*

Nov. 7. LAWRENCE L.J. read the judgment of the Court written by Lord Hanworth M.R., which (after stating the facts as above) continued : The plaintiffs claim that they are entitled to have judgment in default of appearance entered. They are not content to proceed under Order XIII., r. 16, which provides that in actions by moneylenders for the recovery of money lent, an application for leave to enter judgment in default of appearance shall be made by notice returnable not less than two clear days after service of the notice. They claim that they are not moneylenders within any statute applicable to them, and they object to this rule, and the exercise of the powers of the Court prescribed by it, which are those of s. 1 of the Moneylenders Act, 1900, as extended by s. 10 of the Moneylenders Act, 1927.

Mr. Wallington, on their behalf, argues that the Moneylenders Acts do not apply to them—that it has been decided in the case of *Shaik Sahied* v. *Sockalingam Chettiar* (1) that the Moneylenders Act is a branch of " legislation which is intended to regulate the exercise in England only of particular activities by providing for registration, licences, procedure, and penalties which can only be carried into effect in England itself."

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(1) [1933] A. C. 342, 346.

(2) (1906) 22 Times L. R. 245.

He also relied upon a decision of Ridley J. in *Shrichand & Co.* v. *Lacon* (1) that the Moneylenders Act, 1900, had no application to a contract made in India and to be performed in India by payment at Poona or Bombay. That case depended upon the well-known rule stated by Ridley J., that the law of the place where the contract was made is prima facie that which the parties intended to prevail, and ought to prevail in the absence of circumstances indicating a different intention. It is the rule that was laid down in *Lloyd* v. *Guibert.* (2) The judgment of Willes J. prescribes the rule to be followed, and it was clearly applicable to the case before Ridley J., where the place of business of the moneylenders was stated to be in India, and the place where the contract was made and was to be performed was in India.

The facts of the present case are not so clear. The place of business of the plaintiffs does not appear, even upon a document put before us which purports to be a copy of a note signed by the defendant at Lucknow, and to provide for payment "in Bombay or at their option in Poona or Ahmedabad or elsewhere." There is, as already mentioned, a place in Surrey stated to be the address for service which was agreed between the parties on the same date as the promissory note was made. Since *Shrichand & Co.* v. *Lacon* (3) was decided, the Moneylenders Act, 1927, has been passed, which by s. 19, sub-s. 1, is to be read with the earlier Act. There is no definition in the Acts of a moneylender, other than that it includes every person whose business is that of moneylending, though it excludes certain persons and businesses, e.g., pawnbrokers and banking.

But the Act of 1927 has imposed certain duties upon the Court. Thus, in *Mills Conduit Investment, Ld.* v. *Leslie* (4) it was held by the full Court that the defendant's consent to judgment being signed against him did not relieve the Court of its duty to presume in given circumstances that the interest charged was excessive, and that the transaction was harsh and unconscionable, unless the contrary was proved. In the judgment of the Court it is stated (1) that "it cannot be that the sanction and authority of the Court must be given to a transaction prima facie harsh and unconscionable merely because the defendant has given his consent to the adoption of a particular course." Sect. 10, which was considered in that case runs: "Where in any proceedings in respect of any money lent by a moneylender, after the commencement of this Act." Sect. 11 provides that no action by a moneylender for the recovery of money lent by him shall be brought in any inferior court other than a county court. Sect. 12 contains a prohibition against any agreement being made between a moneylender and a borrower for a charge for expenses on loans, and s. 13 imposes a limit of time for proceedings in respect of money lent by moneylenders.

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(1) 22 Times L. R. 245.
(2) (1865) L. R. 1 Q. B. 115.
(3) 22 Times L. R. 245.
(4) [1932] 1 K. B. 233.

The rule is clear that the remedy is to be enforced according to the lex fori; and in *Leroux* v. *Brown* (2) it was decided that an action will not lie in the courts of this country to enforce an oral agreement made in France and valid there, which if made here could not, by reason of the Statute of Frauds, have been sued upon. It will be remembered that the words of the statute are not that the contract is rendered void, but that no action shall be brought upon it.

In *Moulis* v. *Owen* (3) in reference to an action brought upon a cheque given for a gaming debt, which was valid according to the law of the place where it was given, Lord Collins M.R., held that the claim was defeated, because the contract was rendered null and void by 8 & 9 Vict. c. 109, whereby "no action shall be brought or maintained to recover any such sum of money." Lord Collins adds: "This provision, as Mr. Dicey points out in his reference to *Quarrier* v. *Colston* (4) is now part of the lex fori going ad litis ordinationem."

(1) [1932] 1 K. B. 240.
(2) (1852) 12 C. B. 801.
(3) [1907] 1 K. B. 746, 753.
(4) (1842) 1 Ph. 147.

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It appears that some of the provisions of the Moneylenders Act are of a similar nature, and that he who seeks his remedy here must conform to them. The transaction is one of moneylending, in respect of which there is an obligation upon the Court to observe the lex fori. Unless, therefore, the moneylender can establish that (1.) the Moneylending Acts do not apply to the contract that he seeks to enforce, and (2.) that the lex fori imposes no impediment to his success in his suit, he cannot succeed.

We have nothing before us to show where the plaintiffs carry on their business, or in any way to exclude the Moneylending Acts from consideration by the Court, and we think that the refusal to enter judgment in default of appearance was right. The plaintiffs can proceed by a motion for judgment, or under Order XIII., r. 16, and the matter can then be investigated. The plaintiffs will be able to assert their points after the full facts have been presented to the Court. But in view of the incomplete information before the Court, we are of opinion that it was right to require the plaintiffs to proceed under the rule we have referred to, and that they were not entitled to insist upon the judgment being entered up brevi manu in default of appearance. The appeal is dismissed.

*Appeal dismissed.*

Solicitors: *Rising & Ravenscroft.*

H. C. G.

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*July* 24, 25.

# LAMBE *v.* COMMISSIONERS OF INLAND REVENUE.

*Revenue—Income Tax—Money due but not received—"Income"—Contingent Assessment—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 39, *sub-s.* 2.

Where interest on a loan had not been paid and might never be paid,

*Held,* that the amount thereof ought not to be included in computing the tax-payer's income for income tax purposes for the year during which it was payable.

The commissioners, and the Special Commissioners, in confirming an assessment which included the above interest, informed the tax-payer that the duty thereon would not be collected until in fact the interest had been received by him.

*Held,* that they had no power to do this. They could only confirm, discharge or modify an assessment on income received. There is no authority to make a contingent assessment.

CASE stated under s. 7, sub-s. 6, of the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40) and s. 42, sub-s. 7, of the Finance Act, 1927 (17 & 18 Geo. 5, c. 10) by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts on June 3, 1932, Lieut.-Commander C. E. Lambe, R.N. ("the appellant") appealed against an assessment to sur-tax in the sum of 9025*l.* for the year ending April 5, 1931. In computing the appellant's total income from all sources for the purposes of sur-tax for the said year ending April 5, 1931, there was included a sum of 491*l.* 11*s.* 0*d.* representing interest due to the appellant from Messrs. North & Rose for that year upon a sum of 7500*l.* advanced by the appellant to them under the circumstances hereinafter set out.

The appellant was the life tenant of an estate in Cornwall which comprised a number of china clay works. One of the said works, or setts, known as "rocks," was leased to Messrs. North & Rose for a term expiring September 29, 1942, at a minimum yearly rent of 200*l.* and royalties, plus fixed rents amounting to 29*l.* per annum. The appellant advanced to Messrs. North & Rose on the security of a mortgage of the said sett the sum of 6500*l.* on April 24, 1926, and three further sums of 200*l.*, 600*l.* and 200*l.* respectively, on November 19, 1926, January 25, 1927, and November 14, 1929, all advances bearing interest at a minimum of 6 per cent. per annum, fluctuating with the prices produced by sale of the china clay. The interest on the above was duly paid up to September 29, 1929, but no payments in respect either of principal or interest had been made since, and for the year ending March 31, 1931, a sum of 491*l.* 11*s.* 0*d.* was owing by Messrs. North & Rose to the appellant in respect of the interest. In February, 1931, Messrs. North & Rose were in financial difficulties and the appellant appointed Mr. S. J. Dyer to be receiver under a statutory power contained in his mortgage security. In March, 1931, Messrs. North & Rose called a meeting of their creditors and on March 24, 1931, the said S. J. Dyer was appointed receiver and manager by an order of the Chancery Division, and he had carried on the business ever since. Immediately after the appointment the appellant advanced another 500*l.* and it was stated before the commissioners that he was about to make a further advance to the receiver. The appellant had not received the said sum of 491*l.* 11*s.* 0*d.* and it was stated before the commissioners that it was doubtful whether he ever would receive it.

The commissioners were of opinion that the said sum of 491*l.* 11*s.* 0*d.*, being payable in the year ending April 5, 1931, should be included in the computation of the appellant's total income from all sources for that year. They informed the appellant, however, that the duty on the sum in question would not be collected until it was in fact received by him.

It was contended for the appellant that this sum should not be so included and that the matter was concluded by *Leigh* v. *Inland Revenue Commissioners* (1), and that in the case of interest there can be no liability without receipt.

It was contended for the Crown that mere delay in the payment of the said sum would not justify its exclusion from the said computation of total income, and that the assessment was correctly made.

The Special Commissioners were not satisfied on the evidence that the said sum would never be paid to the appellant, and

(1) [1928] 1 K. B. 73; 11 Tax Cases, 590.

held that it was correctly included in the computation of his total income. They therefore confirmed the assessment having satisfied themselves that the duty thereon would not be collected unless and until it was in fact received by the appellant.

On the requisition of the appellant the Special Commissioners stated this case for the opinion of the High Court.

*Bowe* for the appellant.

*Sir Boyd Merriman S.-G.* and *Reginald Hills* for the Crown.

FINLAY J. This is rather a curious case and, as to the principle it raises, rather an important one. It is a case stated by the Special Commissioners with reference to an appeal by Lieut.-Commander C. E. Lambe of the Royal Navy against an assessment to sur-tax which has been made upon him, and the substantial point which arose in the appeal before the commissioners was whether there should be included a sum of 491*l.* 11*s.* 0*d.* which represented interest due to the appellant from a firm called North & Rose, being interest upon a sum of 7500*l.* which had been advanced to them by the appellant. The appellant is a life tenant of an estate in Cornwall which comprises a number of china clay works. One of these works was leased to Messrs. North & Rose for a term expiring in 1942. The appellant advanced various sums to Messrs. North & Rose upon the security of the said works, all the advances bearing interest at a minimum rate of 6 per cent., but fluctuating with the price for china clay. This interest was paid up to September 29, 1929, but there has been no payment since then, and for the year ending March 31, 1931, a sum of 491*l.* 11*s.* 0*d.* was due and owing to the appellant by Messrs. North & Rose. This firm had got into financial difficulties, and the appellant put in a receiver and the receiver has carried on the business ever since. The commissioners find that the appellant has not received the said sum of 491*l.* 11*s.* 0*d.*, and they add that it was stated before them that it is doubtful whether he ever will receive it. They were of opinion that the sum of 491*l.* 11*s.* 0*d.*, being payable in the year ending April 5, 1931, should be included in the computation of the appellant's total income from all sources for the said year. They informed the appellant, however, that the duty on the said sum would not be collected until it was in fact received by the appellant. The matter came before the Special Commissioners sitting in their other capacity as an appellate tribunal, of course before different commissioners, and the appellate tribunal said that they were not satisfied on the evidence that the said sum of 491*l.* 11*s.* 0*d.* would never be paid to the appellant, and held that the sum was correctly included in the computation of the appellant's total income. They therefore affirmed the assessment, having satisfied themselves that the duty would not be collected unless and until the said sum was in fact received by the appellant.

That brings about a rather curious state of affairs. It is quite clear that an assessment to sur-tax once made and confirmed constitutes a debt due to the Crown. What the Special Commissioners have done is to confirm the assessment, but they say that before they confirmed it they satisfied themselves that "the duty on the said sum of 491*l.* 11*s.* 0*d.* would not be collected unless and until the said sum of 491*l.* 11*s.* 0*d.* was in fact received by him."

I am, of course, perfectly satisfied that the Special Commissioners did satisfy themselves that the sum would not be collected, and I am also perfectly satisfied that any officials connected with the collection of the tax would loyally abide by the direction which had been given by the Special Commissioners. But having said that I must add that I think that this procedure is exceedingly unsatisfactory. The general position is that an assessment is made, that it is then either confirmed, or discharged or modified, but that there emerges, if the assessment is confirmed to any extent, a sum which is due and exigible from the subject who has been assessed. I know of no provision in the Acts which authorises the making of what one may not inappropriately call a contingent assessment, that is, an assessment which says: We assess you on 491*l.* 11*s.* 0*d.*, but having assessed you we tell you that you need not pay unless and until you receive that sum of

491*l.* 11*s.* 0*d.* My attention was called to an observation—only a passing observation, I think—of Rowlatt J. in the case of *Simpson* v. *Bonner Maurice* (1) where he referred to the possibility of some such arrangement being made. I must repeat that I cannot think that this is a satisfactory method of disposing of an appeal. Until the legislature think fit to give authority to make assessments in this contingent form, I feel that an assessment must be a definite thing, and that the Special Commissioners, if they are appealed to, must either confirm the assessment, modify the assessment or discharge the assessment, but that they cannot confirm it, saying that they have, before confirming it, and, I suppose, as a condition of confirming it, satisfied themselves that unless and until a particular event takes place it will not be enforced. I have thought it right to make these observations because no doubt the matter is one of some general importance.

I now come to the point in the case, treating the Special Commissioners as having confirmed the assessment, and the point is whether that assessment was correctly confirmed. The position is that Messrs. North & Rose had defaulted in the sense that they had failed to pay the interest due and owing by them. I accept, as I am bound to accept, the finding of the Commissioners, which is to the effect that it was not certain whether in the future Messrs. North & Rose would or would not be able to pay this sum. The Special Commissioners find expressly that they were not prepared to hold that it was certain that they would not be able to pay. I rather gather, though they do not say so, that it would have affected their decision if they had been able to find that.

Now the point which in these circumstances is raised for my decision is whether, where there is a sum due to the tax-payer by way of interest, which by reason of the default of the debtor is not paid, that sum can come in as a part of the income. Looking at the matter quite generally, one would suppose that income means that which comes in, and that it refers to what is actually received. Income may be of various sorts, income under Schedule A and various schedules, but none the less the

(1) (1929) 14 Tax Cases, 580, 591.

tax is a tax on income. It is a tax on what in one form or another goes into a man's pocket. That is the general principle. I may refer to, without reading it, a passage in Lord Finlay's speech in the leading case of *Inland Revenue Commissioners* v. *Blott* (1) in the House of Lords, quoting from the judgment of Pitney J. in *Eisner* v. *Macomber* (2) in the Supreme Court of the United States, where he lays down the general principle as to income and what is income. My attention was called to a number of authorities in which matters somewhat like this have been considered. With the single exception of *Inland Revenue Commissioners* v. *Earl of Haddington* (3)—a decision of the Court of Session where this point was not argued, though I think implicit in the decision—the cases are all one way on the actual point to be decided here, namely, whether in order to attract tax there must be income in the sense of something coming in. I am not going through the cases in detail, but I may refer to *Leigh* v. *Inland Revenue Commissioners* (4), *Grey* v. *Tiley* (5), *Simpson* v. *Bonner Maurice* (6), and *St. Lucia Usines and Estates Co.* v. *St. Lucia* (*Treasurer*) (7), all of which, if fairly looked at, are in agreement with the general principle which I have indicated. They do to some extent differ upon a point which no doubt is a difficult point upon which one may see that there might be a difference of opinion, and that point is this : What is the position where there is income receivable in a number of years, one, two, three, four and five and nothing is received in one, two, three or four, but in five the whole of the five years' income is paid ? It is a difficult question and one upon which, it seems to me, looking at the authorities, opinion to some extent may well have fluctuated, whether, when that payment is made, it is to be treated as income of year five in which it is made, or as income of the years one, two, three and four in respect of which, as well as of year five, it is paid. I think that if the authorities, and particularly the judgment of Lawrence L.J. in *Simpson* v. *Bonner Maurice* (6) are looked at, it will be seen that the judges

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(1) [1921] 2 A. C. 171, 195.

(2) (1920) 252 U. S. 189, 207.

(3) 1924 S. C. 456 ; 8 Tax Cases, 711.

(4) [1928] 1 K. B. 73 ; 11 Tax Cases, 590.

(5) (1932) 16 Tax Cases, 414.

(6) 14 Tax Cases, 580.

(7) [1924] A. C. 508.

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deciding these difficult cases were none of them suggesting that there can be a tax where there is in fact no income received. But as I have said there is room for a difference of opinion as to the year for which the income received is assessable. I do not propose to go through the cases. The decision of Rowlatt J. in *Leigh* v. *Inland Revenue Commissioners* (1), which, I think, has not been questioned, strongly favours the view urged on behalf of the appellant here. I think that *Simpson* v. *Bonner Maurice* (2), properly understood, is to the same effect. The real point in that case was remote from the present point. That point, which depended at least in part on recent war legislation, was whether sums received by German bankers on behalf of the appellant during the war were in fact to be regarded as received by him. To make my references to the authorities complete I ought to refer to *Hawley* v. *Inland Revenue Commissioners* (3) which was much relied on by the Solicitor-General. But that case does not really support his view for it is quite clear that the income in that case had in fact been received. I do not propose to say more upon the cases.

It appears to me to be clear both on construction and on authority that, as the law stood before 1927, this claim by the Crown to assess income which has not been received and which —I use the words purposely—may never be received, must have failed. But it is said that as a result of s. 39, sub-s. 2, of the Finance Act, 1927, a change in the law has been effected. But in construing that sub-section one must not forget the principle laid down in *Greenwood* v. *Smidth & Co.* (4) and many other cases, that where it is contended that the legislature has extended the area of charge one must look for clear words to effect that extension, and that prima facie one ought to find those words in an amendment of the schedules which, after all, are the charging portion of the Act, not forgetting, however, that nevertheless one has to construe the section.

Now the general object of s. 39 of the Act of 1927 is perfectly clear. It is a section inserted with reference to the

(1) [1928] 1 K. B. 73; 11 Tax Cases, 590.
(2) 14 Tax Cases, 580.
(3) (1925) 9 Tax Cases, 331.
(4) [1922] 1 A. C. 417, 423.

substitution of sur-tax for super-tax, and there are a number of consequential provisions necessary, and this is one of them. The first part of the section gets rid of the confusion, which had caused much trouble, due to the provisions of r. 19 of the General Rules applicable to Schedules A, B, C, D and E of the Income Tax Act, 1918, which in effect said that on payment of certain sums one had to deduct tax at the rate applicable to the period over which the sums had accrued due. The result was that a great number of people had to do a rather difficult and troublesome sum, because there might be one rate at one period and another rate at another period. That was got rid of by sub-s. 1 of s. 39 of the Act of 1927. But it is sub-s. 2 upon which the Solicitor-General has placed all his reliance, and it is as follows: "In estimating under the Income Tax Acts the total income of any person, any income which is chargeable with income tax by way of deduction at the standard rate in force for any year shall be deemed to be income of that year, and any deductions which are allowable on account of sums payable under deduction of income tax at the standard rate in force for any year out of the property or profits of that person shall be allowed as deductions in respect of that year, notwithstanding that the income or sums, as the case may be, accrued or will accrue in whole or in part before or after that year."

Now the suggestion from the Crown appears to be that that has effected a startling change in the law and that it has brought into the area of assessment sums which have not been received and which may never be or will never be received. I do not think that that is the effect of this legislation at all, and I think that it is all governed by the words "any income." After all, surtax is leviable upon the total income, and I think that before this sub-section operates there must be an income, and there must be deduction, and there cannot be deduction if there is nothing from which to deduct. I think that the essential condition of the application of the sub-section is that there should be income, income going out from the person who pays it, and coming in to the person receiving it, and that then there should be deduction from that income. The

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meaning of s. 39 and the scheme now in operation is this: Supposing there is, as in this case, interest due on a loan, then, if the matter goes through in the ordinary way and the interest is paid there is no difficulty at all—the tax is deducted at the appropriate rate and the income is brought in as part of the income of the recipient. But supposing a period arrives at which, by reason of the default of the debtor, interest is not paid. In that case, in my opinion, there is no income—there is nothing to assess, nothing to deduct from. If unfortunately the loan is irrecoverable so that it is a dead loss to the creditor, then the latter will not be liable to any assessment in respect of it. But now let us suppose that three years hence the debtors here happily become prosperous again and are in a position to pay and that they do pay, say in 1936, the interest for that year and also the interest for the five preceding years. Then it seems to me that an additional assessment can properly be made on Lieut.-Commander Lambe, and, though made in 1936, the payments will be referred to each of the years in which they were receivable and he will be liable to assessment in respect of each of those years. That, as I read it, is the result of the sub-section.

I have thought it right to make these observations because the matter has been a good deal discussed, but it is really sufficient for the decision of the present case to say that in my opinion there is nothing in s. 39, sub-s. 2, which induces me to think that the suggested startling change in the law has been effected, and that as a result of it a person is liable to an assessment of sur-tax in respect of income which he has not received and, to put it at the lowest, he may never receive. In my opinion on the facts as they are stated the appeal succeeds and will be allowed with costs.

*Appeal allowed.*

Solicitors for appellant: *Torr & Co.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

W. L. L. B.

## DREW *v.* DINGLE.

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*Nov.* 2.

*Road Traffic—Public Service Vehicle—Express Carriage—Carrying Passengers for Hire or Reward—"Separate fares"—Motor-lorry used to carry Passengers with their Goods—Market Produce—Inclusive Charge for Passenger and his Goods—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61, *sub-s.* 1 (*b*); *s.* 67; *s.* 72.

The respondent was charged with using a motor vehicle as an express carriage, without holding a public service vehicle licence or a road service licence. He was using his motor-lorry to carry passengers with their market produce to the market. He made an inclusive charge for the conveyance of each passenger and his goods:—

*Held*, that as the fares were paid separately by each passenger, it was immaterial that the passengers also carried some market produce with them. The respondent's motor-lorry was used as an express carriage within s. 61, sub-s. 1 (*b*), of the Road Traffic Act, 1930, which describes express carriages as motor vehicles carrying passengers for hire or reward at separate fares.

Case stated by justices of Saltash, Cornwall.

Two complaints were preferred by the appellant, Police Superintendent James Henry Drew, against the respondent, Ernest Dingle, charging him (1.) with having on December 31, 1932, unlawfully used a motor vehicle as an express carriage, not being the holder of a public service vehicle licence to use it as a vehicle of that class, contrary to s. 67 of the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43); and (2.) with using the same vehicle on the same occasion as an express carriage, not being the holder of a road service licence to use it as a vehicle of that class, contrary to s. 72 of the same Act. (1)

The following facts were proved or admitted: that on December 31, 1932, the respondent was driving his motor-lorry at Saltash, Cornwall, when he was stopped by a police constable.

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(1) By the Road Traffic Act, 1930, s. 61: "(1.) Public service vehicles shall, for the purposes of this Part of this Act and the regulations made thereunder, be divided into the following classes:—

. . . . . . . .

(*b*) Express carriages; that is to say, motor vehicles carrying passengers for hire or reward at separate fares (none of which is less than one shilling for a single journey or such greater sum as may be prescribed) and for a journey or journeys from one or more points specified in advance to one or more common destinations so specified, and not stopping to take up or set down passengers other than those paying the appropriate fares for the journey or journeys in question."

He was then carrying in the lorry a quantity of market produce and five passengers, who were the owners of some of the market produce, and were accompanying their produce to the market. Two of the passengers, both of Stoke Climsland, paid the respondent 10*s.* for the conveyance of their produce and themselves from Stoke Climsland to Saltash; two others paid him 7*s.* each for the conveyance of their produce and themselves; and the fifth 5*s.* 3*d.* for the conveyance of his produce and himself from Callington to Saltash. The respondent had neither a public service vehicle licence nor a road service licence for the lorry.

The appellant contended that the vehicle was being used as an express carriage within the meaning of s. 61, sub-s. 1 (*b*), of the Road Traffic Act, 1930, and that the respondent should have both a road service licence and a public service vehicle licence in respect of the lorry.

The respondent contended (1.) that the lorry was adapted to carry less than eight passengers, and was used on a special occasion; and (2.) that no separate fares were charged for the passengers. The charge was made in respect of the carriage of the produce to market, and would have been the same if the passengers had not been carried.

The justices were of opinion, in so far as it was a question of fact, that the payment of one sum to cover the conveyance of both the passengers and their goods did not constitute the conveyance of passengers at separate fares within the meaning of s. 61 of the Road Traffic Act, 1930, and that no separate fares were charged in respect of the passengers, and that the lorry was a vehicle ordinarily used for the purposes of agricultural

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By s. 67: "(1.) No person shall cause or permit a motor vehicle to be used on any road as . . . . an express carriage . . . . unless he is the holder of a licence (in this Act referred to as 'a public service vehicle licence') to use it as a vehicle of that class. . . .

. . . . . . . .

(3.) If any person causes or permits a vehicle to be used in contravention of this section, he shall be guilty of an offence."

By s. 72: "(1.) Subject to the provisions of this section the commissioners may grant to any person applying therefor a licence (in this Act referred to as a 'road service licence') to provide such a road service as may be specified therein, and a vehicle shall not be used as . . . . an express carriage except under such a licence."

trade and not adapted for carrying eight or more passengers. The justices came to the conclusion that the motor-lorry could not be described as a public service vehicle or an express carriage, and they accordingly dismissed the informations.

The complainant appealed.

*Wilfrid Lewis* for the appellant. The respondent was carrying in the motor-lorry a quantity of market produce and five passengers, who were the owners of some of the produce, and were accompanying their produce to the market. A market is not a special occasion within the meaning of the proviso to sub-s. 1 of s. 61 of the Road Traffic Act, 1930: see *Miller* v. *Pill*. (1) The justices having found as a fact that a payment was made in respect of the carriage of a passenger, it is immaterial that that payment included a charge for the carriage of his goods. A fare was in fact charged in respect of each passenger. The respondent's vehicle was used to carry passengers for hire or reward at separate fares and was therefore used as an express carriage within the meaning of s. 61, sub-s. 1 (*b*), of the Road Traffic Act, 1930.

*Dingle Foot* for the respondent. The justices were justified in dismissing the summons, because there was no evidence before them that the respondent's motor-lorry was an express carriage. Nothing can be called an express carriage unless it strictly complies with proviso (*b*) of sub-s. 1 of s. 61 of the Road Traffic Act, 1930. The motor-lorry in this case does not comply with that proviso. The expression "appropriate fares" as used in that proviso must mean uniform fares, and must be something different from the fares which are paid in stage carriages. There is no evidence that a uniform or appropriate fare was paid in this case. The main purpose of the journey in question was the carriage of market produce to the market, and the carriage of the passengers was merely ancillary. The charge was made for the carriage of the produce to market. There was no additional charge for carrying the passengers.

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(1) [1933] 2 K. B. 308.

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LORD HEWART C.J. It is clear that this appeal ought to be allowed. The appellant's contention is that the motor vehicle referred to was being used as an express carriage within the meaning of s. 61, sub-s. 1 (*b*), of the Act of 1930. (1) I think that is so. Much has been said by Mr. Foot on the question of separate fares, but it seems to me that the evidence is all one way. The fares were paid separately by the passengers, and it is immaterial that those passengers also carried some market produce with them. It is clear on the facts that this vehicle satisfies all the requirements of an express carriage, and there were two offences committed. First, there was no public service licence, and, secondly, no road service licence. I think, therefore, that the case ought to go back to the justices with a direction that the offences charged have been proved.

AVORY J. I am of the same opinion. It is difficult to tell what was in the minds of the justices when they said by their opinion that this lorry was a vehicle ordinarily used for the purpose of agriculture, trade or business, and not adapted to carrying eight or more passengers. I am satisfied that they were wrong in their opinion that the conveyance of passengers and their goods did not constitute the conveyance of passengers at separate fares. The passengers were being carried for hire or reward within s. 61, sub-s. 1 (*b*), and the only question really before the justices was whether they were being carried for hire or reward at separate fares. On the facts found it is clear that they had paid separate fares for being carried, and in my opinion it is immaterial that they were carrying with them either something in the nature of luggage or market produce. I think this case ought to be sent back to the justices with the direction of this Court that the offence has been proved.

LAWRENCE J. I think the construction to be placed on the words "separate fares" becomes fairly clear by the contrast between sub-s. 1 and sub-s. 2 of s. 61 of the

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(1) See note (1) ante, p. 187.

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Lawrence J.

Road Traffic Act, 1930. Sub-s. 1, in paras. (*a*) and (*b*), deals with the contract for carrying passengers at separate fares, and in para. (*c*) for the use of the carriage as a whole.

When the words used in sub-s. 1 are contrasted with those used in sub-s. 2, in reference to separate payments made by persons, it is clear that the words mean "separate" as between various passengers. I agree, therefore, that the appeal should be allowed.

*Appeal allowed.*

Solicitor for the appellant: *The Treasury Solicitor.*

Solicitors for the respondent: *Foot, Bowden & Blight, Plymouth.*

T. W. M.

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# HONEYWILL AND STEIN, LIMITED *v.* LARKIN BROTHERS (LONDON'S COMMERCIAL PHOTOGRAPHERS), LIMITED.

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*Oct.* 12, 13, 20.

*Negligence—Work involving special danger to others—Extra-hazardous acts—Delegation to independent Contractor—Negligence of independent Contractor—Liability of Employer.*

Where a person employs an independent contractor to do work which involves special danger to another's premises, he must take reasonable precautions to see that the work does not cause damage to the premises.

Where, therefore, the plaintiffs had procured the defendants, as independent contractors, to take photographs of the interior of a cinematograph theatre, and owing to the defendants' negligence the premises were damaged by fire:—

*Held*, reversing the judgment of Bennett J., that the plaintiffs were liable to the owners of the theatre for the damage caused by the negligence of the defendants, and therefore were entitled to recover damages from the defendants for breach of contract or negligence in taking the photographs.

*Brooke* v. *Bool* [1928] 2 K. B. 578 approved and applied.

APPEAL from Bennett J. (sitting as an additional judge of the King's Bench Division).

The plaintiffs, who were specialists in acoustic work, had installed a sound reproduction apparatus at a cinematograph theatre owned by the Denman Picture Houses, Ld. They then obtained permission from the owners to have photographs taken of the interior of the theatre, for their own business purposes, and they employed the defendants to take the photographs. The defendants first took a photograph without flashlight, but as it was not satisfactory they took photographs of the interior with flashlight, which, according to the evidence, was the usual method of photographing interiors. The use of flashlight involved the ignition of a certain amount of magnesium powder in a metal tray or holder held above the lens. That powder on being ignited flared up and developed an intense heat, and hence was dangerous if brought near fabrics or other inflammable material, so that not only must precautions be taken against draughts, but there must be no inflammable material too close when the flash is fired. On the occasion in question the operator took the photograph by placing the camera on the stage, in the space between the footlights and the curtain, and ignited the magnesium powder at a distance of not more than four feet from the curtain. The trial judge found that in doing so he was guilty of negligence. The curtain caught fire from the ignited magnesium, and damage was done before the fire could be extinguished to the extent of 261*l.* 4*s.* 3*d.*

The cinema company threatened the plaintiffs with an action to recover that amount. The plaintiffs, acting under advice, paid the cinema company the amount claimed as the cost of repairing the damage caused by the fire, and claimed to recover the same amount from the defendants. It was contended by the defendants that that payment was a purely voluntary payment, because the plaintiffs would have had a defence to any claim brought against them by the cinema company based on the ground that the damage was caused by the negligence of the defendants, who were independent contractors, and not servants or agents of the appellants, so that the plaintiffs were not responsible for the defendants' acts or defaults.

Bennett J. held that the work to be done by the defendants for the plaintiffs was not necessarily attended with risk, but that it was work which, as a general rule, would seem to be of quite a harmless nature, and gave judgment for the defendants.

The plaintiffs appealed.

*N. L. C. Macaskie K.C.* and *Ian C. Baillieu* for the appellants. In the circumstances of this case a duty was imposed on the plaintiffs which they could not evade by employing an independent contractor to do the work. The work of taking photographs of interiors by flashlight involves the risk of fire unless certain precautions are taken, and the plaintiffs were under a duty to see that those precautions were observed, and are responsible to the owners of the cinema for the damage caused by the failure of the defendants to observe them: see *Holliday* v. *National Telephone Co.* (1); *Brooke* v. *Bool* (2); *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (3); *Pickard* v. *Smith* (4); *Tarry* v. *Ashton.* (5) Cockburn C.J. said in *Bower* v. *Peate* (6), that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful: see also the judgment of Rigby L.J. in *Hardaker* v. *Idle District Council.* (7) The plaintiffs had no defence to the claim made against them by the cinema owners, and the payment by them to the cinema owners was not a voluntary payment, and they are entitled to recover from the defendants damages for breach of contract, or for negligence.

(1) [1899] 2 Q. B. 392.
(2) [1928] 2 K. B. 578.
(3) (1861) 6 H. & N. 488.
(4) (1861) 10 C. B. (N. S.) 470.
(5) (1876) 1 Q. B. D. 314.
(6) (1876) 1 Q. B. D. 321, 326.
(7) [1896] 1 Q. B. 335, 352.

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*S. H. Levine* (with him *Monckton K.C.*) for the respondents. The question is whether taking photographs by flashlight is a dangerous operation, or whether the plaintiffs brought a dangerous thing to the premises. There is a distinction between dangerous work and other work: see *Dalton* v. *Angus*, per Lord Watson. (1) When an employer contracts for the performance of work, which properly conducted is not dangerous, he is not liable for damage arising from the negligence of the independent contractor. Here, the work which the defendants were employed to do was not dangerous intrinsically. It was only work which, by their method of doing it, became dangerous. In *Rapson* v. *Cubitt* (2), the defendant, a builder, was employed by the committee of a club to do certain alterations at the club-house, including the preparation and fixing of gas-fittings. He made a sub-contract with a gas-fitter to do part of the work. While the gas-fitter was doing his work, the gas exploded owing to the negligence of the gas-fitter, and the plaintiff was injured. It was held that the defendant was not liable for the injury to the plaintiff. The principle of that case applies to the present case, where the defendants had entered the premises under a contract to do certain work. The plaintiffs were not liable to the owners of the cinema for the damage which arose from the negligence of the defendants. The payment which has been made by the plaintiffs to the owners was a voluntary one, and they cannot recover from the defendants, because they suffered no damage. The plaintiffs would have had a defence to any claim brought against them by the owners of the cinema on the ground that the damage was caused by the negligence of the defendants, who are independent contractors, and not the servants of the plaintiffs, so that the plaintiffs were not responsible for the defendants' acts or defaults.

*Cur. adv. vult.*

1933. Oct. 20. The following judgment, which was the judgment of the whole Court (LORD HEWART C.J., LORD WRIGHT and SLESSER L.J.), was read by:—

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(1) (1881) 6 App. Cas. 740, 831.

(2) (1842) 9 M. & W. 710.

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Honeywill and Stein, Ld. v. Larkin Brothers, Ld.

Slesser L.J. The appellants, the plaintiffs in the action, are specialists in acoustic work. They had done acoustic work in a cinema owned by the Denman Picture Houses, Ld. (hereinafter called "the cinema company"), and were anxious to have photographs taken of the interior of the cinema. They accordingly applied to the cinema company for the necessary permission to send a photographer to take the photograph; that permission was granted them, and an appointment was accordingly made with the cinema company for the respondents, the defendants in the action, who are photographers, to attend at the cinema to take photographs, the appellants having employed the respondents to do that work. The respondents in due course went to the cinema; a photograph was taken without flashlight, but it was not satisfactory; the respondents accordingly went again to the cinema to take a photograph with flashlight. The respondents' evidence was that the use of flashlight is the normal way of photographing interiors, and is employed in photographing large interiors in the majority of cases, but that it is inevitably attended with danger. In fact it obviously involves the making either of fire, or explosion, or both, because it involves the ignition in a metal tray or holder held above the lens, of a certain amount, one ounce or more, of magnesium powder or Agfa. This powder, on being ignited, flares up, and develops an intense heat, and hence is dangerous if brought into close proximity with fabrics, or other inflammable material, so that not only must precautions be taken against draughts, but there must be no inflammable material too close when the flash is fired. On the occasion in question the operator took the photograph by placing the camera on the stage, in the space between the footlights and the curtain, and ignited the magnesium at a distance of not more than four feet from the curtain. The learned judge has found that in doing so he was guilty of negligence. The curtain caught fire from the ignited magnesium, and damage was done before the fire could be extinguished to the extent of 261*l.* 4*s.* 3*d.* It is not contested that the respondents are liable to the appellants either in contract or for negligence, but it is contended that no damages, or merely nominal

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damages, are recoverable from the respondents by the appellants because, it is said, the appellants suffered no damage; while it is admitted that the appellants, acting under advice, and under threat of a writ being issued, paid the cinema company the amount claimed as the cost of repairing the damage caused by the fire, it is contended by the respondents that this payment was a purely voluntary payment, because the appellants would have had a defence to any claim brought against them by the cinema company, that is, a defence based on the ground that the damage was caused by the negligence of the respondents, who were independent contractors, and not servants or agents of the appellants, so that the appellants were not responsible for the respondents' acts or defaults; it was said that the respondents were the only persons whom the cinema company could have successfully sued. It was rightly conceded that the respondents were, as regards the appellants, independent contractors.

It is well established as a general rule of English law that an employer is not liable for the acts of his independent contractor in the same way as he is for the acts of his servants or agents, even though these acts are done in carrying out the work for his benefit under the contract. The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor. Cases like *Laugher* v. *Pointer* (1) and *Reedie* v. *London & North Western Ry. Co.* (2) state the general rule of law that the ultimate employer is not responsible for the negligence of the independent contractor or his men. It was said by Lord Blackburn in *Dalton* v. *Angus* (3): "Ever since *Quarman* v. *Burnett* (4) it has been considered settled law that one employing another is not liable for his collateral negligence

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(1) (1826) 5 B. & C. 547.
(2) (1849) 4 Ex. 244.
(3) 6 App. Cas. 740, 829.
(4) (1840) 6 M. & W. 499.

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unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (1); *Pickard* v. *Smith* (2); *Tarry* v. *Ashton.* (3)" But there are exceptions to this rule; it may be that, as in other cases of vicarious liability, the tendency of the English law, as it has developed since the dates of the cases just mentioned, has been rather to enlarge the scope of these exceptions, but the development has followed certain broad lines. It is clear that the ultimate employer is not responsible for the acts of an independent contractor merely because what is to be done will involve danger to others if negligently done. The incidence of this liability is limited to certain defined classes, and for the purpose of this case it is only necessary to consider that part of this rule of liability which has reference to extra-hazardous acts, that is, acts which, in their very nature, involve in the eyes of the law special danger to others; of such acts the causing of fire and explosion are obvious and established instances. Thus in *Black* v. *Christchurch Finance Co.* (4), a case of creating a fire in the bush, which spread to an adjoining owner's land, it was said in the opinion of the Privy Council: "The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property (sic utere tuo ut alienum non laedas). And if he authorises another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences: see *Hughes* v. *Percival* (1), and authorities there cited." Similarly in *Holliday* v. *National Telephone Co.* (2), where a passer-by on the highway was injured through the negligence of a plumber engaged by the defendant company under an independent contract, it was held that the defendant company were liable. A. L. Smith L.J. thus sums up the case (3): "The defendants were a telephone company who were engaged in the execution on a highway of works which were clearly dangerous. It obviously involves a certain amount of danger to have a cauldron of molten lead on a highway. The defendants, therefore, on the hypothesis that Highmore was an independent contractor, were delegating to him the execution of dangerous work upon a highway. The deputy judge finds that in making the joints between the pipes it was a proper thing for the purpose of getting the necessary flare to dip the benzoline lamp into the molten metal. The safety-valve of the lamp being out of order, the result of doing that was that the lamp exploded, and the molten metal was scattered about, some falling on the plaintiff who was passing by upon the highway. The defence is that the defendants are not liable in respect of the injury sustained by the plaintiff, because it was occasioned by the negligence of an independent contractor for whom they are not responsible. In my opinion, since the decision of the House of Lords in *Hughes* v. *Percival* (1), and that of the Privy Council in *Black* v. *Christchurch Finance Co.* (4), it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Highmore was engaged to perform."

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(1) 6 H. & N. 488.
(2) 10 C. B. (N. S.) 470.
(3) 1 Q. B. D. 314.
(4) [1894] A. C. 48, 54.

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(1) (1883) 8 App. Cas. 443.
(2) [1899] 2 Q. B. 392.
(3) [1899] 2 Q. B. 399.
(4) [1894] A. C. 48.

The decision in this case, in our judgment, does not depend merely on the fact that the defendants were doing work on the highway, but primarily on its dangerous character, which imposes on the ultimate employers an obligation to take special precautions, and they cannot delegate this obligation by having the work carried out by independent contractors. This is equally true when the work being done by the independent contractor for the ultimate employer is being done on another person's premises. It was so held by Talbot J. in *Brooke* v. *Bool.* (1) The defendant there went into the plaintiff's shop, and got another man named Morris to help to ascertain if there was an escape of gas; Morris proceeded to investigate, using in the process a naked light. Talbot J. thus stated his conclusion: "It is obvious that to examine a place in which an escape of gas is suspected is highly dangerous, unless proper care is taken; and that one of the necessary precautions against disaster is to avoid the use of a naked light. In my opinion the defendant, having undertaken this examination, was under a duty to take reasonable care to avoid danger resulting from it to the shop and its contents, and, if so, he cannot escape liability for the consequences of failure to discharge this duty by getting, as he did, some one to make the examination, or part of it, for him, whether that person is an agent, or a servant, or a contractor, or a mere voluntary helper. This is the principle of such cases as *Bower* v. *Peate* (2); *Black* v. *Christchurch Finance Co.* (3); *Hughes* v. *Percival* (4); *Hardaker* v. *Idle District Council* (5); and see the judgment of Lord Blackburn in *Dalton* v. *Angus.* (6) The principle is that if a man does work on or near another's property which involves danger to that property unless proper care is taken, he is liable to the owners of the property for damage resulting to it from the failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another, whether agent, servant or otherwise, to do it for him. A like principle applies to work done in or near a highway involving danger to those who use it: see e.g. *Holliday* v. *National Telephone Co.* (1)" In our opinion the principles enunciated by Talbot J. are correct, and are applicable to the present case. To take the photograph in the cinema with a flashlight was, on the evidence stated above, a dangerous operation in its intrinsic nature, involving the creation of fire and explosion on another person's premises, that is in the cinema, the property of the cinema company. The appellants, in procuring this work to be performed by their contractors, the respondents, assumed an obligation to the cinema company which was, as we think, absolute, but which was at least an obligation to use reasonable precautions, to see that no damage resulted to the cinema company from these dangerous operations: that obligation they could not delegate by employing the respondents as independent contractors, but they were liable in this regard for the respondents' acts. For the damage actually caused the appellants were accordingly liable in law to the cinema company, and are entitled to claim and recover from the respondents damages for their breach of contract, or negligence in performing their contract to take the photographs.

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(1) [1928] 2 K. B. 578, 587.
(2) 1 Q. B. D. 321.
(3) [1894] A. C. 48.
(4) 8 App. Cas. 443.
(5) [1896] 1 Q. B. 335.
(6) 6 App. Cas. 740.

The learned judge has found for the respondents because he has held (founding himself on the words of Lord Watson in *Dalton* v. *Angus* (2)) that the work to be done by the respondents for the appellants "was not necessarily attended with risk. It was work which, as a general rule, would seem to be of quite a harmless nature." But, with respect, he is ignoring the special rules which apply to extra-hazardous or dangerous operations. Even of these it may be predicated that if carefully and skilfully performed, no harm will follow: as instances of such operations may be given those of removing support from adjoining houses, doing dangerous work on the highway, or creating fire or explosion: hence it may be said, in one sense, that such operations are not necessarily attended with risk. But the rule of liability for independent contractors'

(1) [1899] 2 Q. B. 392.

(2) 6 App. Cas. 740, 831.

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acts attaches to these operations, because they are inherently dangerous, and hence are done at the principal employer's peril.

For these reasons, we are of opinion that the appeal must be allowed, the judgment of the learned judge set aside, and judgment entered for the appellants for the amount of the damage.

*Appeal allowed.*

Solicitors for the appellants : *Linklaters & Paines.*
Solicitors for the respondents : *Berrymans.*

T. W. M.

## HARTE *v.* WILLIAMS.

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*Nov. 1.*

*Solicitor—Unqualified person—Drawing an "instrument relating to real or personal estate"—"For or in expectation of fee, gain or reward"—Lease under hand only—Agreement under hand—Stamp Act,* 1891 (54 *&* 55 *Vict., c.* 39), *s.* 44—*Finance Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 32), *s.* 60.

The Stamp Act, 1891, s. 44, makes it a penal offence for a person "not being a barrister or a duly certificated solicitor, law agent, writer to the signet, notary public, conveyancer, special pleader, or draftsman in equity," to draw or prepare any instrument relating to real or personal estate in expectation of fee, gain, or reward. But (proviso 2 (*b*) ) the expression "instrument" does not include an "agreement under hand only."

Under the above section it is an offence for a person not so qualified as provided therein to draw or prepare, in expectation of a fee, an instrument which purports to be a lease, but which is invalid, being unsealed. Such a document is not an "agreement under hand only" within the meaning of the proviso.

So *held* by Lord Hewart C.J. and Avory J., Lawrence J. dissenting.

CASE stated by justices for the borough of Hastings.

An information was preferred before the justices against the appellant, Richard Harte, by the respondent as solicitor for and on behalf of the Law Society, for that he, "not being

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duly qualified, did unlawfully either directly or indirectly, for or in expectation of a fee given or received draw or prepare" an instrument relating to real estate to wit a lease dated September 27, 1932, and made between Rosa Harte (married woman) of the one part and Frederick John Miles of the other part of certain property known as 12, High Street, in the said borough contrary to the Stamp Act, 1891, s. 44, and the Finance Act, 1921, s. 60. (1)

At the hearing of the information it was proved that the appellant held none of the legal qualifications named in the Stamp Act, but carried on business as an estate agent. In or about August, 1932, the appellant negotiated on behalf of his wife, the owner, with one Miles a lease for twenty-one years of 12, High Street, Hastings. On or about August 27, 1932, the appellant volunteered to prepare the lease so as to save the solicitor's fee and said that he was entitled to do that. The appellant adapted a printed form of lease published by the Solicitors' Law Stationery Society, Ld., and filled in the names of the parties, parcels, term and rent and caused a typewriting agency to make one copy and two engrossments of this document which was in the form of a full repairing lease for a long term. He directed the typist to omit the reference to a seal in the testatum and attestation clause and put on no seal. On October 6, 1932, Miles signed a counterpart and on that occasion the appellant stated that he had saved Miles six or seven guineas solicitors' fees. In this form the document was put before the justices signed by Rosa Harte, the lessor, under hand. It was handed by the appellant to Miles as the lease of the premises. The appellant admitted in evidence that he expressly omitted any seal because he was aware that he could not charge for preparing a deed. The appellant had volunteered to have the lease properly stamped. The document did not in fact bear any stamp denoting that the requirements of s. 28 of the Finance Act, 1931, had been complied with. The appellant had no knowledge of the said section and therefore had taken no steps to comply with its provisions. Consequently by the Stamp Act, 1891, s. 14, sub-s. 4, the document was deemed not to have been duly stamped and could not be used as evidence in any civil proceeding. The appellant on December 7, 1932, delivered to Miles an account containing (inter alia) an item "Preparing Copy Lease 1*l*. 5*s*. Stamping Lease and Counterpart 1*l*." Miles had not asked for a copy of the lease nor had the question of a copy been mentioned at any time and (save as hereinafter mentioned) none was supplied. The appellant accounted for the charge by producing an account which he alleged related to the typing of the document signed by Mrs. Harte, the counterpart signed by Miles and a copy. This account did not amount to more than 12*s*. 3*d*. He also alleged that the paper parchment on which these were typed cost 1*s*. or 1*s*. 3*d*. each and that there were three of them. As to the balance he said that he had all the trouble of the matter and there were the running expenses of the office. In fact a copy would not cost more than 5*s*., and the justices came to the conclusion that the charge was made by the appellant for the purpose of obtaining some recompense for his trouble in preparing the lease of the premises and was made in the form in which it was in order to conceal the fact that he was making a charge for preparing the instrument.

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(1) The Stamp Act, 1891 (54 & 55 Vict., c. 39), s. 44, provides:—

"Every person who (not being a barrister, or a duly certificated solicitor, law agent, writer to the signet, notary public, conveyancer, special pleader, or draftsman in equity) either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument relating to real or personal estate, or any proceeding in law or equity, shall incur a fine of fifty pounds. Provided as follows:—

. . . . . . . . . . . .

(2) The expression "instrument" in this section does not include—(*b*) an agreement under hand only."

By the Finance Act, 1921, s. 60, a fine incurred under this section is now recoverable summarily, instead of in manner provided by s. 121 of the Stamp Act, 1891.

On January 23, 1933, after disputes had arisen between the parties, what purported to be a copy of the document was sent by the solicitors of Mrs. Harte to the solicitors of the said Miles and was returned on the ground that no copy had been asked for. In fact it was not a copy, as the document signed by Mrs. Harte was witnessed by one Clayton and the purported copy showed that the appellant was the witness.

Miles repudiated the charge and the sum charged had not been paid to the appellant.

It was contended on behalf of the appellant that the document in question, though void in law and having no legal effect as a lease under the Real Property Act, 1845 (now the Law of Property Act, 1925, s. 52), was good and had equitable effect as an agreement for a lease: *Walsh* v. *Lonsdale* (1); and that being in fact an "agreement under hand only" it was expressly excluded from the operation of the Stamp Act, 1891, s. 44, proviso 2 (*b*), and was accordingly not an "instrument" within the meaning of that section, and that, the statute having specially defined the word "instrument," the word permitted of no inconsistent interpretation. It was further contended that even if it were in law such an instrument, what the appellant really intended to charge for amounted to no more than making engrossments of a document which was in substance drawn and prepared by the Solicitors' Law Stationery Society, Ld., and as such exempt under s. 44, proviso 1 (*b*).

[This last contention was abandoned in argument before the Divisional Court.]

For the respondent it was contended that the Stamp Act, 1891, s. 44, prohibited any person, not being qualified as therein stated, from drawing or preparing any instrument relating to real or personal estate for or in expectation of any fee, gain or reward, and that on the facts hereinbefore stated and proved the defendant had prepared such an instrument for or in expectation of a fee; that it was for the appellant to show that he was within any of the exceptions and that he had not done so; that he was not a person employed merely to engross the instrument; that the instrument was not an agreement under hand only, but a void lease; that the circumstances that a void lease might operate (if at all) under the principles of equity did not make it an agreement under hand only; that an agreement under hand only means an instrument valid and intended to operate in law as such.

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(1) (1882) 21 Ch. D. 9.

The justices, being of opinion that the document was an instrument within the meaning of s. 44 of the Act notwithstanding proviso 2 (*b*), and that it was not an engrossment within s. 44, proviso 1 (*b*), convicted the appellant, and fined him 10*l.* and costs.

At the request of the appellant the justices stated this case for the opinion of the Court, the question being whether the justices came to a correct decision in point of law.

*Dutton Briant* for the appellant. No penalty was incurred here by the appellant, because the document was an agreement under hand only. Such an agreement is not an "instrument" and is excluded by proviso 2 (*b*) to s. 44 of the Stamp Act, 1891, from the operation of the section. The onus is upon the prosecution to prove that the document is a lease, and by the Law of Property Act, 1925, s. 52, which requires a lease for twenty-one years to be by deed, it is invalid, not being under seal. It is not a deed because it is not sealed, and there is no half-way house between an instrument under seal and an agreement under hand; *In re Balkis Consolidated Co., Ld.* (1) Sect. 44 must be construed strictly, being a penal section. In *Rex* v. *Inhabitants of Ridgwell* (2) it was held that an agreement, which purported to be a conveyance of land but could not operate as such, was effective as an agreement only, in virtue of a stipulation not to disturb the party intending to take the premises. No interest in the land could pass in consequence of this document, although it would be effective in equity as an agreement for a lease. The proper test is: "What is the legal effect of the instrument"? The appellant's motive should not be taken into consideration, but only the document itself.

*Roland Burrows K.C.* and *Alan Bell* for the respondent. The offence here was complete before execution of the document. The section speaks of "drawing or preparing" any instrument, and the fact that the document only purported to be a lease and was not a valid lease is not material. In *Taylor* v. *Crowland Gas & Coke Co.* (3), Parke B. said:

(1) (1888) 58 L. T. 300.
(2) (1827) 6 B. & C. 665.
(3) (1854) 10 Ex. 293, 296.

"Now, looking at the statute, I am of opinion that the object of the Legislature was to confine the practice of drawing the instruments therein specified to a certain class supposed to have a competent knowledge of the subject, and to protect the public against the mistakes of inexperienced persons in matters of this kind; and with that view, the Legislature has prohibited these acts being done except by a particular class of persons." The document here purported to be a lease, and it related to real property. The preparation of this instrument was an offence within s. 44 of the Act, for which the appellant was rightly convicted.

*Dutton Briant* in reply. No limitation can be read into the statute as to the meaning of the words "agreement under hand only." The appellant knew that he was not preparing a deed, and only intended to prepare something less than a deed.

LAWRENCE J. As I have the misfortune to differ from my brother judges in this case, it is for me to deliver the first judgment.

This is a question which arises upon the construction of the Stamp Act, 1891, s. 44. The question is whether the appellant, in drawing and preparing a document, which is called a lease, dated September 27, 1932, for or in expectation of a fee, gain or reward, was preparing that instrument relating to real or personal estate within the meaning of s. 44. In my judgment he was not. The statute is a penal statute interfering with the liberty of the subject. The onus of establishing that he was drawing or preparing an instrument within that section clearly was upon the prosecution. We have not got to consider any question of fraud or false pretences or anything of that sort; it is simply a question of whether the appellant was brought within the words of the penal statute. In order to arrive at the true construction of the statutes, it is necessary to read the main part of the section with sub-s. 2 which provides, "The expression 'instrument' in this section does not include—(*b*) an agreement under hand only." Thus, the offence is "drawing or preparing an instrument relating to real estate" not including "agreements under hand only." It is not an offence to draw or prepare an agreement relating to real estate if that instrument is an agreement under hand only. Those words, "an agreement under hand only," seem to me clearly to refer to one of the two categories which, I think, exhaust the genus written agreement, namely, agreements under seal and agreements under hand only. The instrument in this case was designedly drawn without seal, and in my view falls into the category of agreements under hand only. My brother Avory J. referred during the course of the argument to the word "delivered," which occurs at the end of the instrument, but no reference was made by Mr. Roland Burrows in his argument to that word, and I do not think that its presence in the instrument prevents the instrument being an agreement under hand only. In my view, the fact that the instrument was called a lease makes no difference at all. It makes no difference whether it is called a lease or a conveyance, or whether any other name is given to it. It is undoubtedly an instrument relating to land, and the only question is whether it is an agreement under hand only, as I hold it is. It is said that this construction admits of the mischief at which the statute is directed, but in my view it is highly unlikely that any one would find it a profitable employment to draw instruments of this sort which are void. Void leases or void conveyances, as Mr. Roland Burrows pointed out, although they may be and are enforceable in equity, have not the same force as the valid document which they purport to be or to be called. I think, therefore, that the mischief at which the statute aims will not be fostered by the construction which I put upon the Act, but, if it were, I should still be compelled to give to a penal statute the construction which in my opinion it naturally bears.

For these reasons I think that the question which is put to us ought to be answered in the negative, and that the justices ought to be directed to acquit the appellant.

AVORY J. In my opinion the justices in this case were right in holding that the document in question was an instrument

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Avory J.

within the meaning of the Act, notwithstanding proviso 2 (*b*), and accordingly were justified in convicting the appellant of the offence set out in the information, namely, that he "did unlawfully either directly or indirectly for or in expectation of a fee given or received draw or prepare an instrument relating to real estate, to wit, a lease dated the 27th day of September, 1932." To get rid of one point which has been made by Mr. Briant, let me say here that I do not assent to his proposition that the words, "to wit a lease dated 27th September, 1932," in this information mean a valid lease. Mr. Briant argued that in order to support this information it was necessary to prove that the appellant had prepared a valid lease. In my opinion the words "to wit a lease dated the 27th September, 1932," merely mean, "to wit a document *purporting to be* a lease dated 27th September, 1932." Indeed, an illustration, given by my Lord during the argument, shows that that is the real meaning of the words. If a man is charged with forging a note of the Bank of England, to wit a 5*l.* note, that does not mean that it is a genuine 5*l.* note; it only means a note purporting to be a 5*l.* note of the Bank of England.

I think it is now necessary to look at the facts which are found in this case in order to see whether the offence under s. 44 has been committed. The case finds that in August, 1932, the appellant negotiated on behalf of his wife, who was the owner, with one Miles a lease for twenty-one years of No. 12, High Street, Hastings; that on or about August 27, 1932, the appellant volunteered to prepare the lease so as to save the solicitor's fee, and said that he was entitled to do that, and he thereupon adapted a printed form of lease, which was in the form of a full repairing lease for a long term, but he directed the typist to omit the reference to a seal in the testatum and attestation clause, and to put on no seal. The appellant stated that in doing what he had done he had saved Miles, the lessee, six or seven guineas, solicitor's fees. The document was handed by the appellant to the lessee Miles as the lease of the premises, and the appellant admitted in evidence that he expressly omitted any seal because he

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was aware that he could not charge for preparing a deed. He had volunteered to have the lease properly stamped. Now, upon that set of facts the question is: Did he, within the Stamp Act, 1891, s. 44, "for or in expectation of any fee, gain or reward draw or prepare any instrument"—which means any document in writing—"relating to real or personal estate," which was not, within the meaning of the proviso, an agreement under hand only. In construing this section I have no doubt that we ought to adopt the words of Parke B. in the case of *Taylor* v. *Crowland Gas & Coke Co.* (1), where he said, dealing with a statute which was in almost identical terms: "Now, looking at the statute, I am of opinion that the object of the Legislature was to confine the practice of drawing the instruments therein specified to a certain class supposed to have a competent knowledge of the subject, and to protect the public against the mistakes of inexperienced persons in matters of this kind; and with that view, the Legislature has prohibited these acts being done except by a particular class of persons." I would only add that, in my opinion, the object is not only to protect the public against the mistakes of inexperienced persons, but a fortiori to protect the public against the wilful acts of inexperienced persons who know that they are committing a breach of the law and are seeking to avoid the consequences.

The argument of Mr. Briant seems to me to involve reading into s. 44 the word "valid," which does not occur there at all. Mr. Briant contends that the offence is only committed when a man for fee or reward draws or prepares a *valid* instrument relating to real or personal property. He says that because the appellant here was drawing a document which purported to be a lease, which he represented to be a lease, of which he had copies and sent what purported to be a copy of a lease, and because that document in fact was not a valid lease, not being under seal, that therefore the appellant was not preparing an instrument relating to real or personal estate, but was merely preparing an agreement under hand only. In my view, it is quite impossible that the appellant

(1) 10 Ex. 293, 296.

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can be heard to say, upon the facts of this case, that he was preparing an agreement under hand only, and therefore the justices were right in their conclusions and in convicting the appellant.

LORD HEWART C.J. While I differ, with regret and respect, from the judgment of Lawrence J., I am clearly of opinion that this appeal ought to be dismissed. I need not repeat what has been said by Avory J., but it seems to me that the arguments made before the justices on behalf of the respondent were sound, and in particular that the Stamp Act, 1891, s. 44, prohibited any person, not being qualified as therein stated, from drawing or preparing any instrument relating to real or personal estate for or in expectation of any fee, gain or reward. On the facts stated in this case, and proved, the appellant had prepared such an instrument in expectation of a fee or reward, and this instrument was not an agreement under hand only, but a void lease. An agreement under hand only means an instrument valid and intended to operate in law as such. The document here, which we have had in our hands, bears all the marks of a lease, except that it is not under seal, and I think that the words of Martin B., no less than the words of Parke B., in *Taylor* v. *Crowland Gas & Coke Co.* (1), are in point. It is quite true that the learned Baron was referring to a slightly different enactment (44 Geo. III., c. 98), but his observations apply no less clearly to the present section. His words were these: "Upon carefully reading the enactment, it is obvious that it was intended to secure to a particular class the sole employment and practice in conveyancing."

I agree entirely with the judgment of Avory J., and think that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors for appellant: *H. S. Wright & Webb, for Willett & Phillips, Bexhill.*

Solicitors for respondent: *Blyth, Dutton, Hartley & Blyth, for Menneer, Idle, Brackett & Williams, St. Leonards-on-Sea.*

F. P. F.

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(1) 10 Ex. 293, 296, 297.

# MAYOR, ALDERMEN AND CITIZENS OF COVENTRY *v.* SURREY COUNTY COUNCIL.

C. A.
1933
*Oct.* 26.

*Poor Law (Settlement)—Child—Illegitimate Child under sixteen—Adoption Order—Settlement of adopting Father not acquired—Adoption of Children Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 29), *s.* 5—*Poor Law Act,* 1930 (20 *Geo.* 5, *c.* 17), *ss.* 85, 86, 93.

The Poor Law Act, 1930, s. 93, sub-s. 4, provides : " No child under the age of sixteen residing in a county or county borough with his father, mother, stepfather, stepmother or reputed father shall be removed, nor shall any order be made for the removal of the child, from the county or county borough in any case where the father, mother, stepfather, stepmother or reputed father may not lawfully be removed therefrom " :—

*Held*, by the Court of Appeal, that when an order has been made under the Adoption of Children Act, 1926, for the adoption of a child under sixteen, the child does not by residing with the adopter, who is himself irremovable, become irremovable from the county or county borough where the adopter resides under s. 93, sub-s. 4, of the Poor Law Act, 1930, and so acquire a settlement in that county or county borough under s. 86, sub-s. 1, of that Act. In such a case therefore the child retains his parent's settlement.

Although by s. 5, sub-s. 1, of the Act of 1926 " upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents . . . . of the adopted child, in relation to the future custody, maintenance and education of the adopted child " vest in and become exercisable by and enforceable against the adopter " as though the adopted child was a child born to the adopter in lawful wedlock," s. 93, sub-s. 4, of the Poor Law Act, 1930, cannot be read as if the word " adopter " replaced the word " father " or " mother," seeing that the Acts consolidated in the Act of 1930 are not included by s. 5, sub-s. 5, of the Act of 1926 in the enactments for the purpose of which " the adopter shall be deemed to be the parent of the child."

Decision of the Divisional Court [1933] 2 K. B. 384 reversed.

*Ward* v. *Dorman, Long & Co.* [1933] 2 K. B. 658 applied.

APPEAL from the decision of the Divisional Court (Lord Hewart C.J., Avory and Humphreys JJ.) (1) on a case stated for the opinion of the Court pursuant to the Quarter Sessions Act, 1849, s. 11.

On September 15, 1932, upon complaint by the respondents, an order was made by justices of the peace for the county of Surrey that Wilfred Wilton Hall, a poor person, be removed to the city and county borough of Coventry.

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(1) [1933] 2 K. B. 384.

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COVENTRY (MAYOR, ETC.) v. SURREY COUNTY COUNCIL.

The appellants gave notice of appeal against the order to the Court of Quarter Sessions for the county of Surrey. By consent of the parties and by order of Talbot J., dated February 2, 1933, a special case was stated between the appellants and respondents, the parties agreeing that judgment in conformity with the decision of the High Court be entered at Quarter Sessions in accordance with the Quarter Sessions Act, 1849.

The case stated was as follows:—

Wilfred Wilton Hall (hereinafter called "the poor person") was born on July 16, 1916, at Ashby-de-la-Zouch in the county of Leicester, and is the illegitimate child of Lucy Hall. The said Lucy Hall has since the year 1925 continued to be and still is irremovable from and last settled in the city and county borough of Coventry. The poor person has not resided with the said Lucy Hall since the month of August, 1916. From the month of August, 1916, to the month of February, 1927, the poor person resided with a foster mother in the city and county borough of Leicester. From the month of February, 1927, until October 29, 1931, the poor person resided continuously and without interruption at 33 Arundel Street in the city and county borough of Leicester with Charles Herbert Wall and his wife Martha Ann Wall (hereinafter together called "the adopters").

On November 25, 1927, an order was made by Ida Warner, a justice of the peace for the city of Leicester, pursuant to the Adoption of Children Act, 1926, authorizing the adopters jointly to adopt the poor person.

From a date prior to November 25, 1927, the adopters have continued to be and still are irremovable from, and last settled in, the city and county borough of Leicester.

From October 29, 1931, until July 26, 1932, the poor person was an inmate of the Gordon's Boys' Home at Woking in the county of Surrey. On July 26, 1932, the poor person became chargeable to the county of Surrey. On September 15, 1932, two of His Majesty's justices of the peace acting in and for the county of Surrey ordered the poor person to be removed to the city and county borough of Coventry.

On October 27, 1932, within the time prescribed by the Poor Law Act, 1930, s. 97, sub-s. 1, the appellants duly gave notice of appeal against the said order of removal to the Court of Quarter Sessions holden in and for the county of Surrey, and on November 17, 1932, within the time prescribed by s. 97, sub-s. 2, of the Poor Law Act, 1930, the appellants duly served upon the respondents a statement of the grounds of appeal.

The appellants contend: That since November 25, 1927, the poor person has for the purposes of the Poor Law Act, 1930, stood to the adopters in the same relation as a child would have stood to a lawful father and mother respectively; that, while residing with the adopters in the city and county borough of Leicester between November 25, 1927, and October 29, 1931, the poor person was, by reason of s. 93, sub-s. 4, of the Poor Law Act, 1930, irremovable therefrom and acquired a settlement therein by virtue of s. 86, sub-s. 1, of the Poor Law Act, 1930 (1), and still retains that settlement; alternatively, that by virtue of s. 85, sub-s. 1, of the Poor Law Act, 1930, the poor person has derived from the said Charles Herbert Wall a settlement in the city and county borough of Leicester and still retains that settlement; that the poor person is not last settled in the city and county borough of Coventry.

(1) The Poor Law Act, 1930 (20 Geo. 5, c. 17), provides:—

Sect. 85, sub-s. 1: "Until a person acquires a settlement of his own or derives a settlement from a husband, that person—

. . . . . . . . . . .

(*b*) if an illegitimate child, shall take and follow, up to the age of sixteen, the settlement of his mother; and shall in either case retain the settlement which, under the foregoing provisions of this section, he had at the age of sixteen."

Sect. 86, sub-s. 1: "Where a person has resided for the term of three years in a county or county borough in such manner and in such circumstances in each of those years as would, in accordance with the provisions contained in this Act, render him irremovable, he shall be deemed to be settled in that county or county borough."

Sect. 93, sub-s. 4: "No child under the age of sixteen residing in a county or county borough with his father, mother, stepfather, stepmother or reputed father shall be removed, nor shall any order be made for the removal of the child, from the county or county borough in any case where the father, mother, stepfather, stepmother or reputed father may not lawfully be removed therefrom."

The respondents contend: That the order referred to above should be disregarded for the purposes of the Poor Law Act, 1930; that while residing with the adopters in the city and county borough of Leicester between November 25, 1927, and October 29, 1931, the poor person was not by reason of s. 93, sub-s. 4, of the Poor Law Act, 1930 (1), irremovable therefrom and did not acquire a settlement therein by virtue of s. 86, sub-s. 1, of the said Act; that by virtue of s. 85, sub-s. 1, of the Poor Law Act, 1930 (1), the poor person has derived from the said Lucy Hall a settlement in the city and county borough of Coventry and still retains that settlement; that the poor person is last settled in the city and county borough of Coventry.

The question for the opinion of this Court is whether or not the poor person is last settled in the city and county borough of Coventry.

The Divisional Court held that the combined effect of the Adoption of Children Act, 1926, and the Poor Law Act, 1930, was to place the adopting father of a poor person in the position of the lawful father so that the poor person had acquired a settlement of his own in the city of Leicester by virtue of his adopting father being settled in and irremovable from that city under the Poor Law Act, 1930, s. 86, sub-s. 1, and s. 93, sub-s. 4. The order of the justices must therefore be quashed.

The Surrey County Council appealed. The appeal was heard on October 26, 1933.

*Montgomery K.C.* and *W. B. Manley* for the appellants. An adoption order only affects the relationship inter se of the child, the natural parent and the adopting parents, and does not affect local authorities in their responsibilities under the Poor Law Act, 1930. The adoption order is made under the Adoption of Children Act, 1926 (2), and s. 5 of that Act states the effect of an adoption order in transferring the rights, duties, obligations and liabilities of the natural parent to the adopters. In view, however, of the express provision of sub-s. 5 specifying statutes in which the adopter is to be deemed the parent of the child and the omission of the Poor Law Act, 1930, this section cannot make the adopter the parent for the purposes of that Act.

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(1) See note (1) ante, p. 213.

(2) Adoption of Children Act, 1926, s. 5, provides: "(1.) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents . . . . of the adopted child, in relation to the future custody, maintenance and

[LORD HANWORTH M.R. In *Ward* v. *Dorman, Long & Co.* (1), a case arising under the Workmen's Compensation Acts, the Court held that, as those Acts were not referred to in s. 5, sub-s. 5, of the Act of 1926, the latter Act could not be applied to make an adopted child a dependant of the workman who had adopted him.]

It is contended that the principle of that case applies here. Although the Poor Law Act, 1930, was passed subsequently, it was only a consolidation of statutes then in existence which could have been referred to. Further the Poor Law Act, 1930, contains no reference to the Act of 1926 except in s. 52, sub-s. 7, in connection with another matter.

[SLESSER L.J. It seems difficult to say that the rights and liabilities transferred by s. 5, sub-s. 1, of the Act of 1926 are only domestic.]

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education of the adopted child . . . . shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock, and in respect of the same matters and in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock:

Provided that, in any case where two spouses are the adopters, such spouses shall in respect of the matters aforesaid and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother of the adopted child. . . . ."

"(5.) For the purposes of the enactments relating to friendly societies, collecting societies and industrial assurance companies, which enable such societies and companies to insure money to be paid for funeral expenses, and which restrict the persons to whom money may be paid on the death of a child under the age of ten, the adopter shall be deemed to be the parent of the child; . . . ."

(1) Since reported [1933] 2 K. B. 658.

It is not necessary for the appellants to contend that, but only that any question of settlement under the Poor Law Act, 1930, is not a right, duty, obligation or liability transferred to the adopter.

[SLESSER L.J. In view of the transfer of the liability to maintain, would not the adopter be included in the category of persons having a duty to relieve and maintain under s. 14 of the Poor Law Act, 1930 ?]

It is contended not. The liability to maintain is only transferred as between the natural parent and the adopter. There is nothing to make the father and mother in s. 14, sub-s. 1, mean the adopters. It is impossible in any case to read into s. 85, sub-s. 1 (*b*), the adopters in place of the mother of an illegitimate child or to read them into s. 93, sub-s. 4. Nor can the adopters be said to be "relatives" within s. 19, sub-s. 2, so as to enable an order for maintenance to be obtained against them. Under s. 85, sub-s. 1, the original settlement of a child is dependent on blood relationship, and yet if the adopter were to be read into the Act of 1930 he would have to be read into that sub-section also.

*S. G. Turner K.C.* and *H. W. Wightwick* for the respondents. None of the reasons of the decision in *Ward* v. *Dorman, Long & Co.* (1) apply here. Although it is true that s. 5, sub-s. 5, of the Adoption of Children Act, 1926, does not expressly refer to the Acts consolidated in the Act of 1930, there is in s. 5, sub-s. 1, a provision that an adopted child shall stand to the adopter in the position of a child in respect of a child's liability to maintain its parents. That can only refer to the liability under the Poor Law Acts of a child to maintain its poor parents: see s. 14, sub-s. 1, of the Poor Law Act, 1930.

The obligation of the Poor Law authority to relieve under s. 15, sub-s. 1 (*b*), is merely by way of substitution for the parent, as is shown by s. 18, which makes relief given to a child under the age of sixteen relief to the parent, and s. 20, which provides for the reimbursement of the relief out of the property of the person relieved. A consideration of this clearly distinguishes this case from *Ward* v. *Dorman, Long & Co.* (1).

(1) Since reported [1933] 2 K. B. 658.

where the rights of third parties under the Workmen's Compensation Acts arose for consideration. On the construction of s. 5, sub-s. 1, of the Act of 1926 the obligation to maintain a child is transferred from the parent to the adopters, and that must refer to the obligation under the Poor Law Acts just as the corresponding obligation of the child to the adopters must do so. It follows that the Poor Law Act, 1930, must be treated as an Act in which the adopter is to be deemed the parent of the child just as much as if the Act had been expressly mentioned in s. 5, sub-s. 5. Further, the status of irremovability conferred on a child by s. 93, sub-s. 4, of the Poor Law Act, 1930, is designed to prevent the breaking up of the home: see per Lord Loreburn in *Fulham Parish* v. *Woolwich Union* (1), discussing the corresponding provision of the Poor Removal Act, 1846. That is also an object of s. 5 of the Act of 1926, and the irremovability provided for in s. 93, sub-s. 4, is a right as to future custody within s. 5, sub-s. 1.

[LORD HANWORTH M.R. Do you say that in s. 85, sub-s. 1 (*b*), providing for an illegitimate child having the settlement of his mother, mother includes adoptive parent ?]

No. That relates only to the original settlement of a child under sixteen until he acquires a new one under s. 84. It was decided that he could do so in *Fulham Parish* v. *Woolwich Union.* (1) Here he has acquired it by the residence of his adoptive father, who became irremovable from Leicester under s. 86, sub-s. 1, and if, as is contended, the adopting father is read into s. 93, sub-s. 4, the child is likewise irremovable from that county borough and has acquired a settlement there.

[No reply was called for.]

LORD HANWORTH M.R. This appeal must be allowed. It raises an interesting point, and we have had the advantage of a good argument on both sides. [His Lordship stated the facts.]

(1) [1907] A. C. 255, 260.

Lord Hanworth M.R.

It will be seen that the point that we have got to decide is whether or not the Poor Law Act, 1930, is to be read otherwise than in accordance with its terms by reason of the Adoption of Children Act, 1926. In the Divisional Court Avory J. said that he thought that the relevant words in the section of the Act of 1930, that is to say s. 93, sub-s. 4, should be read as including the adopting father, although those words were not to be found there, and Humphreys J. said that the Act of 1930 used the word "father" in the widest possible sense and, therefore, that he thought there might be two species of father and mother—namely, a natural father and mother and adopters, and that the adopters, the adopting father and mother, must be included wherever the words "father and mother" occurred in the Act of 1930.

I should like to say at the outset that when the case came before the Divisional Court in May, 1933, *Ward* v. *Dorman, Long & Co.* (1) had not been decided. It was decided by this Court of Appeal on June 26, 1933. The case is relevant to the point which we have to decide, and if it had been available to the Divisional Court I doubt not that a different conclusion would have been reached by the Court. What had to be dealt with in *Ward* v. *Dorman, Long & Co.* (1) was the question how far the Adoption of Children Act, 1926, by reason of its putting the adopters in the place of the natural mother and father, affected statutes which dealt with the position, rights and liabilities of fathers and mothers, but did not refer in terms to the Act. Was the Act to cause an extended interpretation to be placed on all other Acts which dealt with the relation and powers and duties of a father and mother? In that case this Court scrutinized the Adoption of Children Act, 1926, and we pointed out in our judgments that s. 5, sub-s. 1, of that Act, which declares the general effect of an adoption order, in later sub-sections places some limits upon that effect. It is true that sub-s. 1 of s. 5 declares that "all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody, maintenance and education of the adopted child . . . . shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock." But we pointed out in *Ward* v. *Dorman, Long & Co.* (1) that in the same section there are provisions of a restrictive nature defining the limits within which sub-s. 1 operates. To take one instance, under sub-s. 2 the adoption order is prevented from depriving the adopted child of any right or interest in property to which but for the order he would have been entitled under any intestacy or disposition. So that for the advantage of the child the child is still to remain a natural child. Then sub-s. 3 deals with what is to happen in relation to the revenue when the adopted child takes under a succession or receives a legacy. More than that, sub-s. 5 definitely refers to certain enactments in which the adopter is to be deemed the parent of the child for the purposes of those enactments. Under ordinary canons of construction of an Act of Parliament it is, therefore, of importance to notice that the Poor Law Act, 1930, is not included in the enactments referred to in sub-s. 5, just as in *Ward* v. *Dorman, Long & Co.* (1) we noticed that the Workmen's Compensation Act was not included. In referring to the Workmen's Compensation Act or the Poor Law Act, 1930, in this way I am merely using for convenience short terms. But, of course, the Poor Law Act is a codifying Act representing a number of other statutes which were in existence before the Adoption of Children Act, and could have been referred to in s. 5, sub-s. 5. So, too, the Workmen's Compensation Acts of 1906 and 1923 were embodied in the later Act, and in my judgment, in *Ward* v. *Dorman, Long & Co.* (1), I referred I think to the earlier Acts in order to make plain what I meant in relation to the Workmen's Compensation Act.

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(1) [1933] 2 K. B. 658.

The argument of Mr. Turner can be put quite shortly. He says: If you will look at the declaration of the effect of an adoption order in s. 5, you will see that the duties,

(1) [1933] 2 K. B. 658.

obligations, and liabilities of the parents of an adopted child are to be extinguished and to vest in and be exercisable by and enforceable against the adopter or adopters "and in respect of the same matters and in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock." And Mr. Turner argues that the reference to the liability of a child to maintain its parents indicates that the Legislature took notice and was cognizant of all that mass of legislation which has to do with the liability of a child for the maintenance of its parent or of the parent for the maintenance of his child, and therefore of the matters akin to that relating to the settlement of the parents and the liability of the area in which there is a settlement to maintain either the parent or the child with a right of recourse to the one or the other.

I wish to say at once that we are not deciding questions which arise upon sub-s. 1 of s. 5 of the Adoption of Children Act, 1926. It may be that Mr. Turner's argument in respect of that, when the case arises, will prove to be well founded. What we have to consider is what order ought to be made under the Poor Law Act? I turn, therefore, to consider that Act. An illegitimate child under the age of sixteen can acquire a settlement by residence. It is so held in *Fulham Parish* v. *Woolwich Union*. (1) By s. 86 of the Poor Law Act, 1930: "Where a person has resided for the term of three years in a county or county borough in such manner and in such circumstances in each of those years as would, in accordance with the provisions contained in this Act, render him irremovable, he shall be deemed to be settled in that county or county borough." So we have to see whether by reason of residence Wilfred Wilton Hall was rendered irremovable. That irremovability depends upon s. 93, sub-s. 4, which provides: "no child under the age of sixteen residing in a county or county borough with his father, mother, stepfather, stepmother or reputed father shall be removed, nor shall any order be made for the removal of the child.

(1) [1907] A. C. 255.

from the county or county borough in any case where the father, mother, stepfather, stepmother or reputed father may not lawfully be removed therefrom." Has this boy, Wilfred Wilton Hall, acquired irremovability, if I may use the word, under this sub-section? For that purpose we have to see whether or not he fulfilled the terms of sub-s. 4, and it is to be noted that although the category in the sub-section includes "stepfather, stepmother or reputed father," it does not say "or adopter or adopting father." Is it right to say that we must construe sub-s. 4 as embracing an adopter, to use the proper expression under the Adoption of Children Act, although he is not mentioned there, and although this Act was passed after the Adoption of Children Act, 1926? It is quite plain that that Act was not lost sight of in the Act of 1930 because, turning back to s. 52, it will be observed that sub-s. 7, which deals with cases of so-called adoption, specifically provides that the sub-section shall not apply when adoption is effected under the Adoption of Children Act, 1926. We thus have a clear indication that the Legislature recognized the effect and result of a proper legalized adoption under the Adoption of Children Act, 1926, and specifically differentiated that from what they have called "adoption" in this sub-section, but which I should prefer rather to speak of as boarding out, in respect of which power is taken by sub-s. 7 to have the child visited, to have a report made in respect of the child, and to revoke the consent to the adoption.

It appears to me that upon the ordinary reasoning applicable to the construction of successive statutes, and the reasoning adopted in *Ward* v. *Dorman, Long & Co.* (1), it is not possible for us to read into sub-s. 4 of s. 93 "adopter or adopting father or adopting mother." We must read the words as they stand, with the result that in the present case irremovability has not been acquired by the child in respect of his residence with his adopting parents at Leicester. The child remains with the settlement which belonged to him until he acquired a settlement of his own—namely, the settlement of his mother, as declared in s. 85, sub-s. 1 (*b*).

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For those reasons, therefore, and on the same broad grounds on which *Ward* v. *Dorman, Long & Co.* (1) was decided, I hold, following that decision, that this appeal must be allowed.

SLESSER L.J. I agree that this appeal must be allowed. In *Ward* v. *Dorman, Long & Co.* (1) my Lord had occasion to observe that the Act of 1926 does not simply say that the adopted child shall be deemed to be a child of the adopter for all purposes; and the decision in that case is, as I understand it, that any person seeking to substitute an adopter for a natural parent must point to some language in the Adoption of Children Act which either directly or by necessary inference makes the substitution.

There is a distinction to be drawn between the present case and *Ward* v. *Dorman, Long & Co.* (1) not in regard to the principle laid down, which is binding upon us, but in regard to the particular circumstances—namely, that Mr. Turner is able to argue that under s. 5, sub-s. 1, of the Act of 1926 it is contemplated that one of the things which may be extinguished as regards the parent and transferred to the adopter is a thing connected with and affecting the poor law. He says, therefore, that even when the principle of the decision in *Ward* v. *Dorman, Long & Co.* (1) is accepted, it is not necessary to show in this case that the Poor Law Act was specifically mentioned. He says that the language of s. 5, sub-s. 1, providing that all liabilities shall be enforceable against the adopter together with the transference of the liability of a child to maintain its parents for the benefit of the adopter, which he says is a liability that can only arise under the Poor Law statutes, indicates that certain Poor Law rights and liabilities are transferred by s. 5, sub-s. 1. I would respectfully follow my Lord in declining to come to any decisive judgment upon that point, because in my view of the present case it is not necessary to decide it. I would say, to safeguard myself, that I cannot accept the argument, as I understood it, of Mr. Montgomery that in no circumstances can the liability of the adopter to maintain an

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adopted child, or of an adopted child to maintain the adopter, be enforced under the Poor Law statutes by appropriate machinery at the suit of the Poor Law authority. I expressly leave that point open for decision.

But I have come to the conclusion that this appeal must be allowed, because we are not dealing here with the rights and liabilities of the adopter or the adopted child with regard to maintenance under the Poor Law, but with the question of removability and settlement.

So confining my attention, I find some difficulty in understanding the argument. When I look at s. 84, which deals with settlement, I see that by sub-s. 2 a person may in manner provided derive a settlement in a county or county borough from a parent. I should have thought that if Mr. Turner's argument was right, then the adopter would be a parent within the meaning of sub-s. 2 (*a*) so as to give to the child a derivative settlement. But I understand he does not contend that the word " parent " there means the adopter. I think he is wise in not so contending, for I think it is an impossible contention, and that there is no authority in the Adoption of Children Act for making such a substitution. He prefers to proceed under s. 84, sub-s. 2 (*b*), whereby a person may acquire a settlement by residence. That brings me to the sub-section which we really have to consider here—namely, s. 93, sub-s. 4, which deals with irremovability in the case which becomes material by reason of s. 86 of the same Act. Now in order to satisfy the conditions of s. 93, sub-s. 4, it is necessary to show that the words " father and mother " there have by operation of the Adoption of Children Act become the adopters. I do not desire to repeat what my Lord has said as to the decision in the earlier case of *Ward* v. *Dorman, Long & Co.* (1) Granted that the adopter is liable to maintain the adopted child at the suit of the authority, that does not in my opinion make him the father within the meaning of s. 93, sub-s. 4. But my difficulty in understanding the argument, is that I do not know why if an adopter cannot be called a parent for the purpose of s. 84, sub-s. 2 (*a*), he should be called a father for the purpose of s. 93, sub-s. 4. The same difficulty which confronts Mr. Turner in setting up here a derivative settlement makes it equally difficult for him, I think, to apply the doctrine of irremovability under s. 93, sub-s. 4. In truth in neither case does the Adoption of Children Act have this effect; and the arguments of Mr. Wightwick as to the inconvenience of not substituting "adopter" for "parent" in the various sections to which he referred, do not seem to me to meet the point at all. It is perfectly clear that by the Adoption of Children Act, 1926, duties and rights which are vested in the natural father and mother are in certain cases extinguished by the operation of that Act and vested in the adopter. But it does not follow that when the word "father" or "mother" occurs in the Act of 1930 you are to substitute the word "adopter." There is no authority whatever that I can see for making such a change, and, therefore, it being impossible to say that the adopter is the father or the mother, s. 93, sub-s. 4, of the Act of 1930 is of no avail. It does appear that the result may produce considerable inconvenience. That is, however, not a matter for us. Speaking for myself, I do not think the relation between the Adoption of Children Act and other Acts has been fully considered. These decisions may make reconsideration of some matters in that statute desirable. We have to deal with the legislation as it stands, and as it stands I think we cannot make the substitution or inclusion which the Divisional Court thought right.

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ROMER L.J. Agreeing, as I do, with the decision of this Court in *Ward* v. *Dorman, Long & Co.* (1), and with the judgments that have just been delivered, I do not think I shall be wanting in respect to the Divisional Court if I content myself with saying that I am wholly unable to find any sure ground for construing the words "father, mother, stepfather, stepmother or reputed father" as used in s. 93, sub-s. 4, of the Poor Law Act, 1930, in any other than their

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ordinary meaning. It is true that for certain purposes under the Adoption of Children Act, 1926, an adopted child is to be treated as the legitimate child of the adopter. But those purposes are strictly limited and do not include the purpose of giving effect to the provisions of s. 93, sub-s. 4, of the Poor Law Act, 1930. I am not, indeed, quite sure why reliance should be placed upon that sub-section rather than upon the provisions of s. 85, sub-s. 1 (*b*), because if " mother " in s. 93, sub-s. 4, means " a mother by adoption," it must have the same meaning in s. 85, sub-s. 1 (*b*) ; and, therefore, inasmuch as that section says that " until a person acquires a settlement of his own or derives a settlement from a husband, that person— . . . . (*b*) if an illegitimate child, shall take and follow, up to the age of sixteen, the settlement of his mother," all it would be necessary to show would be that at some time before attaining the age of sixteen the adopting mother of the infant had a settlement in Leicester, because it would be said that the word " mother " in that sub-section must mean " mother for the time being," and that as from the date when this adoption order was made in November, 1927, the mother, for the purposes of s. 85, sub-s. 1 (*b*), must be the adopting mother or mother by adoption.

For the reasons I have given, and the reasons given by my Lords, I do not think the word " mother " in that sub-section, or the words " father and mother " in s. 93, sub-s. 4, have any other than their ordinary meaning.

I will only add this, that it is no doubt very convenient for many purposes to refer to an adopter as an adopting father or as a father by adoption ; but in strictness those expressions are quite inaccurate. An adopter does not become a father or in any sense a father. The Act merely provides that for certain purposes the child and the adopter shall mutually stand in the relation of a legitimate child and the parent of the legitimate child. With the greatest respect therefore to Humphreys J., I am unable to agree with him when he says that there was when the Act of 1930 came into existence a species of father and mother called adopters. No new species of father and mother was purported to be created by the Act of 1926. I agree that this appeal succeeds.

*Appeal allowed.*

Solicitors: *Field, Roscoe & Co., for Dudley Aukland, Kingston-upon-Thames; Sharpe, Pritchard & Co., for Vernon Younger, Coventry.*

H. C. G.

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*Dec.* 4, 5.

## ATTORNEY-GENERAL *v.* SOUTHPORT CORPORATION.

*Revenue—Entertainments duty—Seaside bathing lake and grounds—Non-bathers—Liability to tax—"Entertainment"—Finance (New Duties) Act,* 1916 (6 *Geo.* 5, *c.* 11), *s.* 1.

The corporation of a borough were the proprietors of an enclosure which adjoined the sea-shore and included a sea-bathing lake; two areas reserved for sun-bathing; dressing accommodation for about a thousand bathers; terraces with seating accommodation for several thousands of non-bathers sheltered from the wind, and an upper terrace promenade, that accommodation giving the non-bathers a view of the bathing lake, adjacent parks, recreation ground and sea-shore; and a café. The bathing was not organized. The lake and grounds were widely used by visitors and residents as a meeting-place and resort for sheltered sitting and resting in the sun. The sheltered seats, terraces and café were open and used at the same prices whether or not there was bathing. The enclosure was open from April 30 to October 1 from 7 A.M. to 8 P.M. on week days, and for shorter hours on Sundays. The charges for non-bathers were between 2 P.M. and 5 P.M. 4*d.*, and at any other time 3*d.*, these charges being somewhat less than those for bathers. Admission was by ticket obtained at a turnstile:—

*Held,* by the Court of Appeal (affirming the decision of Finlay J.), that the bathing, not being organized, was not an "entertainment" within the meaning of that term as defined for the purposes of the Finance (New Duties) Act, 1916, by s. 1 of that Act, and consequently that entertainments duty under the Act could not be charged on the payments made by non-bathers for admission to the enclosure.

SPECIAL CASE stated by consent pursuant to R. S. C., Order LXVIII., r. 2; and Order XXXIV., r. 1.

The corporation of the county borough of Southport were the proprietors of an enclosed sea-bathing lake and grounds situated in Princes Park, Southport, and adjoining the sea-shore.

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Paragraphs 2 to 7 of the case were as follows :—

(2.) The said lake and grounds were open from April 30 to October 1, inclusive, from 7 A.M. to 8 P.M. on week days and 7 A.M. to 9 A.M. and 2 P.M. to 6 P.M. on Sundays, on terms of admission contained in the following notice exhibited at the entrance :—

"COUNTY BOROUGH OF SOUTHPORT.

SEA BATHING LAKE.

Charges.

| | | | |
|---|---|---|---|
| Bathers . . . . . | 6*d.* | Non Bathers between 2 P.M. and 5 P.M. . .. | 4*d.* |
| Children under 16 years of age . . . . . | 4*d.* | Any other time . . . | 3*d.* |
| Sundays . . . . . | 6*d.* | | |
| Use of costume . . . | 3*d.* | Use of towel . . . . | 2*d.* |
| Use of deck chair . . | 2*d.* | | |

Season tickets : Adults 15*s.* Child 10*s.*

Special books of tickets at reduced rates.

Reduced charge for children in parties when in charge of teacher or Instructor (twelve or over in number), for terms apply ticket office.

Children's tickets not available between 2 P.M. and 4 P.M. during July and August.

Swimming Lessons. Swedish Drill, etc."

Admission was by ticket obtained at a turnstile.

(3.) The sea-bathing lake and grounds included (*a*) the lake, which took the form of an oval, 330 feet at its greatest length, with a maximum width of 212 feet ; (*b*) two large areas reserved for sun-bathing, which were private to the sun-bathers ; (*c*) dressing accommodation for about 1000 bathers ; (*d*) terraces with seating accommodation for several thousands of non-bathers, sheltered from the wind and forming a sun trap, and an upper terrace promenade connecting the dressing pavilions at the south and north ends of the lake for ladies and gentlemen respectively. This accommodation gave non-bathers a view not only of the bathing lake, but also of the

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adjacent parks, recreation ground and sea-shore ; (*e*) a pergola with climbing roses, lawns, flower-beds, rock-gardens, sea waterfalls, etc. ; (*f*) a café.

(4.) The bathing was not organized, save that there were galas on special occasions, for which a special charge was made and in respect of which entertainments duty was paid.

(5.) The sea-bathing lake and grounds were widely used by visitors and residents in Southport as a meeting place and resort for sheltered sitting and resting in the sun.

(6.) The sheltered seats, terraces, lawns, gardens and café were open and used at the same prices whether or not there was bathing or expectation of bathing.

(7.) During the season from April 30, 1932, to October 1, 1932, inclusive, 185,773 non-bathers were admitted to the sea-bathing lake and grounds, of whom 58,051 made payments of 3*d.* each, and 127,722 made payments of 4*d.* each for tickets of admission. . . .

The Commissioners of Customs and Excise claimed as entertainments duty under the Finance (New Duties) Act, 1916, s. 1 (1), ½*d.* duty in respect of each 3*d.* payment, and 1*d.* duty in respect of each 4*d.* payment, these duties amounting in all to 653*l.* 2*s.* 3*d.*, but the defendants declined to pay that sum on the ground that they were not legally liable to do so.

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(1). The Finance (New Duties) Act, 1916 (6 Geo. 5, c. 11), provides :—

Sect. 1. " (1) There shall . . . . be charged, levied and paid on all payments for admission to any entertainment as defined by this Act an Excise duty (in this Act referred to as 'entertainments duty') at the following rate (namely) :—

Where the payment, excluding the amount of the duty,
does not exceed 2*d.* A halfpenny ;
exceeds 2*d.* and
does not exceed 6*d.* One penny ;

. . . . . . . . . . . . .

" (6) For the purpose of the provisions of this Act relating to entertainments duty—

The expression 'entertainment' includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment ; and the expression 'admission to an entertainment' includes admission to any place in which the entertainment is held ;

The expression 'admission' means admission as a spectator or one of an audience, and the expression 'payment on admission' includes any payment made by a person who, having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof for admission to which a payment involving duty or more duty is required."

The Attorney-General, on behalf of His Majesty, by writ of subpœna, claimed that sum of 653*l.* 2*s.* 3*d.* for duties due under the above section and other relevant enactments, and the parties concurred in stating the questions of law arising upon the above agreed facts in the form of this special case.

The question for the opinion of the Court was whether the payment for a ticket of admission by a non-bather to the sea-bathing lake and grounds was a payment for admission to an " entertainment " within the above-mentioned section.

*Sir Boyd Merriman S.-G.* and *W. Bowstead* for the Attorney-General, informant.

The Crown is entitled to recover the sum claimed as entertainments duty. The bathing in the enclosure in question constituted an " entertainment," and the admission of the non-bathers thereto was an " admission to an entertainment " within the meaning of these respective expressions as defined for the purposes of the Finance (New Duties) Act, 1916, by s. 1 of that Act (1): *Cordiner* v. *Stockham* (2); *Terry* v. *Brighton Aquarium Co.* (3); and see also *Attorney-General* v. *Valentia.* (4) That being so, the payments made by the non-bathers for admission to the enclosure are clearly chargeable with entertainments duty under the Act.

*J. E. Singleton K.C.* and *Maxwell Fyfe* for the Southport Corporation, defendants.

As the bathing was not organized, but was engaged in by the individual bathers at their own inclination, it was not an " entertainment," and the admission of the non-bathers to the enclosure was not an " admission to an entertainment " within the meaning of these expressions as used in the Act of 1916: *J. Lyons & Co.* v. *Fox.* (5) The cases of *Cordiner* v. *Stockham* (2) and *Attorney-General* v. *McLeod* (6) are distinguishable, because in each of these cases there was an organized diversion consisting in the former case of a band performing a

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(1) See note (1) ante, p. 228.

(2) [1920] 1 K. B. 104.

(3) (1875) L. R. 10 Q. B. 306. See also substantially the same case on somewhat different facts, nom. *Warner* v. *Brighton Aquarium Co.* (1875) L. R. 10 Ex. 291.

(4) (1924) 41 Times L. R. 78.

(5) [1919] 1 K. B. 11.

(6) [1918] 1 K. B. 13.

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set programme, and in the latter of an arranged concert. Further, even if the bathing was an "entertainment" within the Act, there is no evidence to show that the non-bathers paid for admission in order to see that entertainment, and on the other hand paras. 5 and 6 of the case appear to show that the non-bathers or very many of them entered the enclosure for entirely different purposes, such as sitting in view of the sea, meeting their acquaintances, or drinking coffee. For these reasons the payments made by the non-bathers are not chargeable with entertainments duty.

Finlay J. This case, like all the cases on this Act, is rather troublesome, but I have arrived at the conclusion that, on the particular facts as they are here, the defendants are, upon the whole, entitled to succeed.

The matter arises upon a familiar section—familiar at least to those who have to sit in this Court—namely, s. 1 of the Finance (New Duties) Act, 1916. By that section a duty called the entertainments duty is imposed, and it is necessary for present purposes to look at sub-s. 6 of that section (1), which contains certain definitions. [His Lordship read that sub-section.]

This case relates to the bathing pool at Southport, and one sees from the photographs attached to the case that this bathing pool, like those now formed at many of the big watering places, is a large and rather elaborate affair. The facts with regard to it are found in the case. [His Lordship read paras. 2, 3, 4, 5 and 6 of the special case, and continued as follows:] The special provisions with regard to Sunday do not appear to be material. The Solicitor-General seemed to attach importance to the circumstance that the charge for non-bathers was higher between 2 p.m. and 5 p.m. It may be true that there is more bathing between 2 p.m. and 5 p.m. It may also be true that between 2 p.m. and 5 p.m. is the time when a large number of ladies and gentlemen, especially perhaps invalids resident or staying in a place like Southport are likely to be out and about. I do not, however, think that much importance attaches to that increase of charge, and I only mention it because the Solicitor-General placed some reliance upon it. The paragraphs of the case which I have read give some details about this lake and grounds. The details are very well got from the series of photographs which have instructed me as to what it looks like, and will instruct anybody else who has to consider this case. Para. 7 of the case gives details with regard to the figures, and it appears that more than 127,000 people made payments of 4*d.* for admission, and more than 58,000 made payments of 3*d.*, and that the total number of non-bathers apparently admitted was upwards of 185,000.

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(1) See note (1) ante, p. 228.

The question for me to consider is whether the payment for a ticket of admission by a non-bather is a payment for admission to an " entertainment " within s. 1 of the Finance (New Duties) Act, 1916.

Substantially, Mr. Singleton, who resisted on behalf of the corporation the attempt to levy tax, put his case in two ways. He said, first, that this bathing was not an entertainment because that term connotes something organized, and, secondly, that it cannot be said that the non-bathers entering the grounds pay as spectators of an entertainment. The facts have been found by the Commissioners. Any inferences from the facts it will doubtless be for me to draw, but they must be drawn from the facts found. I do not think, taking the case and looking at the photographs, that there is any difficulty in arriving at a conclusion as to the facts and the inferences to be drawn from them. The place in question is, of course, primarily a place for people to bathe in. Nobody can doubt that that is the object of a bathing pool : and that the primary object for which the corporation built this bathing pool was that people might have the opportunity of obtaining enjoyment and health to themselves by bathing. The place, however, provides in addition, considerable facilities. There are a large number of sunny seats from which a view of the bathing pool is obtained ; there is a café ; there are rock-gardens ; there are waterfalls, and other attractions. The result of that is, I think, not in doubt. It follows from paras. 4, 5 and 6 of the case that a large number of persons do go to this place for the purpose of watching bathing. Many of them no doubt go merely for the purpose of watching people bathing; but some of them, I suppose, go because it amuses them to watch their own relations and friends bathing. In either case they go mainly to watch the gay scene of a number of people bathing, swimming and diving in the lake. That is one aspect of the matter. But there is another side to it, I think. I do not doubt, and indeed it is expressly found in paras. 5 and 6, that a substantial number of people—how many I have not the least idea—go to the lake not in order that they may see bathing, but in order that they may sit in the sunshine, or drink coffee, or meet their friends, or for any other of a thousand purposes for which people may go to an elaborately fitted up place of this sort. That, I think, may be taken as a short summary of the facts and inferences of fact.

In these circumstances I have to decide whether the claim to tax is made out.

I was referred to several authorities, none of which is, I think, directly in point, though more than one of them are of some use. In the first place I may take the case of *Cordiner* v. *Stockham* (1), which related to a band hall on one of the piers at Brighton. That case is useful for what it decides, and also for what it does not decide, for the judgments, and particularly the judgment of Darling J., show that the Court was careful not to go beyond what actually had to be decided. What actually was decided there was that if a person paid 2*d.* for a seat in a hall where a band was playing that was payment for an entrance to an entertainment. The case of *Attorney-General* v. *Valentia* (2) seems to me, as to its actual decision, to have little to do with this case; but the Solicitor-General, with his usual frankness, admitted that the line on which the case went was rather against him. The case does seem to suggest that what I may call the ordinary games of tennis, polo and croquet which were played at the place there in question would not be an entertainment, and that entertainment tax was attracted only by what one may call the

(1) [1920] 1 K. B. 104.

(2) 41 Times L. R. 78.

more highly organized games. I think that to that extent the case does favour Mr. Singleton's view, although I agree that it in no way covers the present case. The case of *Terry* v. *Brighton Aquarium Co.* (1) does not seem to me to touch or to have any bearing on the present case. I should have thought that what the Brighton Aquarium Company there did clearly amounted to the provision of an entertainment, but it does not matter what I think because that is what was decided by the Court. *Attorney-General* v. *McLeod* (2), which was also mentioned, is the case relating to the freemasons' dinner, and I do not think that it is of any very direct assistance to me. Finally, I was referred to *J. Lyons & Co.* v. *Fox* (3), a case about the Trocadero. In that case the facts were very remote from those of this case, but I think that the general principles laid down in the judgments, and especially in the judgment of A. T. Lawrence J., do, to some extent, favour the view which I have taken.

In dealing with the present case one has to take the exact facts as they are. There can be no question that these facts do not show any kind of organized entertainment. There is no band or anything of that sort. These cases are almost always near the line, and I should be disposed to take a different view of this case if anything like that came into question. There is nothing, however, except, so to speak, mere bathing by persons who are willing for their own pleasure and health to go and bathe in the lake. There is no organized swimming or diving or other entertainment of any sort, for it is found, when there is anything of that sort, that a special charge is made, and it is admitted that the entertainment tax is attracted.

On the whole I arrive at the conclusion that what takes place at this bathing pool is not an entertainment, and, of course, it follows that if it is not, the persons who attend are not spectators of an entertainment.

Even if I had arrived at a conclusion other than the one I have arrived at, I should clearly have been of opinion that all

(1) L. R. 10 Q. B. 306. See also *Warner* v. *Brighton Aquarium Co.*, L. R. 10 Ex. 291.

(2) [1918] 1 K. B. 13.

(3) [1919] 1 K. B. 11.

the people who pay do not pay to see an entertainment, and a very troublesome question might have arisen under s. 1, sub-s. 4, of the Act. I should not be at all disposed, having regard to the findings of the Commissioners in paras. 5 and 6 of the case, to say that all the persons who pay to get into the bathing pool enclosure as non-bathers could possibly be said to pay in order that they might see the bathing. It seems to me that to say that would be to fly in the face of what are found to be the facts. I repeat, therefore, that if I were of opinion that the bathing was an entertainment, I should at the same time be of opinion that only some of the people paid to see the bathing, and an inquiry, and a very troublesome inquiry, I should think, might well have to be held under sub-s. 4. But it is not necessary that I should go into that, because for the reasons I have tried to indicate, though not without doubt, I arrive at the conclusion that " entertainment " means something in the nature of an organized entertainment, though not necessarily organized by the persons who are to receive payment for the seat, as is clearly shown by the illustration of the boat race or that of the Lord Mayor's Show. I do not think that where, as here, what is to be looked at is not anything in the nature of an organized entertainment, but is simply the spectacle of people bathing in an unorganized way for their own health and amusement, that can properly be said to be an entertainment. Numerous illustrations were put. I still think that an illustration which I suggested about the sea-shore is a reasonably good one, though it may be a little difficult to know whether the particular facts are likely to arise. If the corporation having rights on the foreshore, as they well may have, were to provide some sort of enclosure and seats where people could sit and look at the sea and at the people who might be bathing in the sea, and might enjoy the sun and other advantages, I cannot think that in that event entertainments duty would be attracted. That case is I think rather close to the present.

The result is that, while thinking the case not free from difficulty and rather near the line, I arrive at the conclusion that the Crown have failed to make out their case, and there must accordingly be judgment for the defendants.

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*Judgment for defendants.*

J. R.

The Crown appealed. The appeal was heard on December 4 and 5, 1933.

*Sir Donald Somervell S.-G.* and *W. Bowstead* for the appellant repeated in substance the arguments used on behalf of the Crown in the Court below.

*J. E. Singleton K.C.* and *Maxwell Fyfe* for the respondents were not called upon to argue.

LORD HANWORTH M.R. This case has provoked a very interesting argument from the Solicitor-General, who has contended that the learned judge came to a wrong conclusion. Now, we have come to the conclusion that Finlay J. was right, but the arguments which have been presented by the Solicitor-General deserve attention.

Let us look at the statute itself to see what is the sort of case in which the entertainments duty is imposed. It is provided by the Finance (New Duties) Act, 1916, s. 1, sub-s. 1: " There shall, as from " a certain date, " be charged, levied and paid on all payments for admission to any entertainment as defined by this Act an Excise duty . . . ." Then, by way of sanction: " If any person is admitted for payment to any place of entertainment and the provisions of this section are not complied with, the person admitted and the proprietor of the entertainment to which he is admitted," are liable as having committed the offence. By sub-s. 3 entertainments duty is to be recoverable, unless paid otherwise, from the proprietor. Now, on that clear indication of the charge of the tax I look at sub-s. 6, which is the interpretation clause, and I am going to lay emphasis upon the words which are more particularly relevant to the present case: " The expression ' entertainment ' includes any exhibition,

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performance, amusement, game or sport to which persons are admitted for payment; and the expression 'admission to an entertainment' includes admission to any place in which the entertainment is held; The expression 'admission' means admission as a spectator or one of an audience"; and lastly: "The expression 'proprietor' in relation to any entertainment includes any person responsible for the management thereof."

Now it seems that at Southport there has been built by the Corporation of the county borough of Southport a large bathing lake or pool, and a large number of persons do bathe in it. Surrounding it, there is an arena which is made suitable for persons to sit in and gaze upon the water, and, incidentally, to see the bathing that is going on; also, there is a promenade round it. It is decorated with flowers and shrubs, and there is at one part a waterfall, and, above all, there is a café where persons can obtain refreshments. This is probably a very attractive feature at Southport. It seems to provide an amenity which can be enjoyed by a very great number of persons. It provides an easy method of comfortable bathing for those who wish to bathe, and an opportunity for a *dolce far niente* afternoon for persons who are not inclined to bathe but who find pleasure in taking a little promenade and meeting others and sitting in the sun and going to the café.

Now the way in which admission is obtained is this: bathers pay 6*d*., but non-bathers pay at all times 3*d*., except during three hours, between 2 P.M. and 5 P.M., when they pay an extra 1*d*. It is perhaps remarkable—one must use one's common sense—that those hours between 2 P.M. and 5 P.M. are probably hours when less bathing is going on, for certainly a large number of persons bathe in the morning, and if they were asked as to the most suitable time for bathing, I should think the time after lunch was probably less suitable than other times; but it is at that time when people go for a promenade and meet their friends that the highest price is paid, the likelihood being that the temptation to meet their friends and so on would be sufficient to make them willing to pay the extra 1*d*. We are told that the grounds include not only the lake but two large areas reserved for sun bathing, "terraces with seating accommodation for several thousands of non-bathers, sheltered from the wind and forming a sun trap, and an upper terrace promenade connecting the dressing pavilions at the north and south ends of the lake for ladies and gentlemen respectively. This accommodation gives non-bathers a view not only of the bathing lake but also of the adjoining parks, recreation ground and sea-shore," and there is "a pergola with climbing roses, lawns, flower-beds, rock gardens, sea waterfalls," and a café. "The bathing is not organised, save that there are galas on special occasions for which a special charge is made [and] in respect of which entertainments duty is paid. The sea bathing lake and grounds are widely used by visitors and residents in Southport as a meeting place and resort for sheltered sitting and resting in the sun. The sheltered seats, terraces, lawns, gardens and café are open and used at the same prices whether or not there is bathing or expectation of bathing."

Upon those agreed facts, can it be said that the Mayor and Corporation are persons responsible for the management of the bathing ? There is no indication that they take any steps to secure that there shall be bathing or diving spread out over any particular hours of the day. They are responsible for the management of the bathing in the sense that it is under their control, and the facilities offered by them must not be misused ; but there is no evidence at all that they responsibly manage the bathing, which is undertaken, of course, voluntarily and at the will and pleasure of the bathers. Is there, then, any exhibition or sport in relation to which they are proprietors and managers ? I cannot so find. It appears to me that there is abundant ground for asking for this price of admission in respect of the other amenities, and that it is impossible to say that there is here an exhibition which is an integral and prominent factor attracting the visitors to the exhibition. There is, incidentally, something that some people may be interested in and others not, but it must be entirely ancillary to the other amenities which are provided and which are of such a nature that they may be used by a number of visitors or residents at Southport attracted thereto by these other

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amenities and not necessarily attracted by any exhibition or sport of which there is a proprietor and which is provided for their entertainment as an attraction. It is noticeable that there are from time to time galas on special occasions, and, on those special occasions, special charges are made, and, in respect of those charges, there is no question that entertainments duty is attracted and is quite readily paid.

For these reasons, upon the facts of the present case, I do not find a charge or tax which falls to be paid by the defendants, and the result is that the appeal must be dismissed with costs.

SLESSER L.J. I agree. When we look at the particular facts of this case, we find this. In para. 6 of the agreed case it says the terraces—I mention particularly the terraces. because in para. 3 (*d*) it is said that the terraces are the places where non-bathers can get their view of the bathing lake—" are open and used at the same prices, whether or not there is bathing or expectation of bathing." The reality of the case is that proprietors, the Mayor, Aldermen and Burgesses of the County Borough of Southport, are quite unable, as I read the case, to say from day to day or from time to time whether there are going to be any bathers there or not. It seems to me that it is impossible in those circumstances to say that there is in any sense provided an entertainment, or that this is a place of entertainment. The distinction is shown very clearly by contrasting what here happens with the case where special contests are arranged by the proprietors, and therefore where they are managing an entertainment for which they have always paid tax.

For myself it seems to be that this is no more a place of entertainment than if these stands had been erected on the sea-shore, and, similarly, persons were admitted who might or might not, as the case may be, see persons bathing in the sea. The mere provision of a structure for bathers does not make that an entertainment which otherwise would not be an entertainment.

ROMER L.J. I agree. In my opinion, an entertainment to come within the provisions of the Finance (New Duties) Act,

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1916, must be some " exhibition, performance, amusement, game or sport " provided, though not necessarily by the owner of the place of entertainment, for the purpose of entertaining those who pay to see or to hear it. In the present case the place that we have to deal with is a place, as it seems to me, provided by the Southport Corporation for the purpose of affording a number of amenities to the public which have been specially referred to by the Master of the Rolls, and which include the opportunity of bathing in the pool there provided. But bathing is merely one of the amenities, and is not provided for the purpose of entertaining persons who go there to enjoy the other amenities.

In my opinion this bathing is not an entertainment provided by the Corporation or any other person.

*Appeal dismissed.*

Solicitor for appellant : *Solicitor for Customs and Excise.*

Solicitors for respondents : *Sharpe, Pritchard & Co., for R. Edgar Perrins, Southport.*

W. I. C.

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# ROBINSON (INSPECTOR OF TAXES) *v.* CORRY.

# CORRY *v.* ROBINSON (INSPECTOR OF TAXES).

*Revenue—Income Tax—Civil Servant employed on duties abroad—Liability to Assessment—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. E, rr.* 1, 6, 18.

An established Civil Servant was appointed by the Lords Commissioners of the Admiralty to a post which necessitated his residing in a colony for several years. During that time he received, in addition to the salary appropriate to his rank in the Civil Service, a colonial allowance to provide for the increased cost of living in the colony. During part of the time he occupied an official house provided for him, and during other parts of the time he received a housing allowance in lieu of an official house:—

*Held*, (1.) that he was assessable to income tax under Sch. E of the Income Tax Act, 1918, and that the tax was chargeable, not only on the salary, but also on the colonial allowance and housing allowance, which must be brought into charge and were not deductible as expenses;

(2.) that the annual value of the official residence was not income chargeable with tax, since it was not money, nor convertible into money by the Civil Servant.

Decision of Finlay J. [1933] 2 K. B. 521 affirmed.

APPEAL and CROSS-APPEAL from a decision of Finlay J. (1) on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of the Commissioners, on March 1, 1932, E. W. C. Corry, of the Royal Naval Torpedo Factory, Greenock (hereinafter called "the appellant"), appealed against assessments to income tax under Sch. E of the Income Tax Act, 1918 (2), by the Commissioners of Income Tax for

(1) [1933] 2 K. B. 521.

(2) The Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. E: "Tax under Schedule E shall be charged in respect of every public office or employment of profit, and in respect of every annuity, pension, or stipend payable by the Crown or out of the public revenue of the United Kingdom, other than annuities charged under Schedule C, for every twenty shillings of the annual amount thereof."

Rules applicable to Sch. E, Rule 1: "Tax under this Schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule, or to whom any annuity, pension, or stipend, as described in this Schedule, is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom . . . ."

Rule 6: "The tax shall be paid

the Admiralty. The assessments were made on him as deputy cashier of H. M. Naval Base at Singapore for the three years ending April 5, 1930, 1931 and 1932, in the sums of 1053*l*. 10*s*., 1342*l*. and 1194*l*. 2*s*. 8*d*. respectively.

2. On July 19, 1928, the appellant, an established Civil Servant, left the United Kingdom, retaining no residence therein, to take up an appointment as deputy cashier in H. M. Naval Base at Singapore. This appointment was approved by the Lords Commissioners of the Admiralty in May, 1928, to date August 1, 1928. The official pay of the appellant as the holder of that appointment was payable to and received by him in the colony of the Straits Settlements from August 1, 1928, to July 24, 1931, during his residence in the colony. His official pay for the period from July 25, 1931, to September 30, 1931, during his return voyage from the Straits Settlements and during subsequent leave of absence granted in respect of his service in the colony, was payable and was paid to him in London, except for the sum of 52*l*. which he received as an advance in the colony. The appellant landed in the United Kingdom on his return thereto on

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in respect of all the public offices and employments of profit within the United Kingdom or by the officers hereinafter respectively described, namely . . . . (*c*) public offices under the civil government of the Crown . . . .; (*d*) officers in His Majesty's navy; . . . . (*k*) all other public offices or employments of profit which are of a public nature."

Rule 10: "Where the Treasury are satisfied with respect to any class of persons in receipt of any salary, fees, or emoluments payable out of the public revenue that such persons are obliged to lay out and expend money wholly, exclusively, and necessarily in the performance of the duties in respect of which such salary, fees, or emoluments are payable, the Treasury may fix such sum, as in their opinion represents a fair equivalent of the average annual amount laid out and expended as aforesaid by persons of that class, and in charging the tax on the said salary, fees, or emoluments, there shall be deducted from the amount thereof the sums so fixed by the Treasury: Provided that if any person would, but for the provisions of this rule, be entitled to deduct a larger amount than the sum so fixed, that sum may be deducted instead of the sum so fixed."

Rule 18: "(2.) A person chargeable in respect of an office or employment of profit shall be deemed to exercise it at the head office of the department under which it is held, and shall be assessed and charged at that head office, although the duties of the office or employment are performed, or any profits thereof are payable elsewhere, whether within the United Kingdom or not."

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September 22, 1931. Since October 1, 1931, he had served as deputy cashier at H. M. Torpedo Factory, Greenock, to which he was appointed (his appointment to date October 1, 1931) in August, 1931. From July 19, 1928, until October 1, 1931, the appellant was not resident in the United Kingdom.

3. Whilst in the colony the appellant was entitled to be provided with housing accommodation or to be paid an allowance for house rent in lieu thereof, at a rate fixed by the Admiralty with the concurrence of the Treasury for persons of the appellant's class or rank. A condition of the occupation of an official house was that it was not to be let in whole or in part to any person whatsoever.

When in occupation of an official house in the colony the appellant was required to make it his constant place of residence (except so far as he might obtain leave of absence), and when he did not occupy an official house he was required to live within a reasonable distance of his place of duty in the colony.

The appellant was in occupation of an official house from August 20, 1928, to September 20, 1929. For the remainder of his residence in the colony he provided himself with a house, but during part of that period—namely, from June 15, 1930, to April 29, 1931—owing to a dispute as to the quality of the housing accommodation to be provided, he received no allowance for house rent in lieu thereof.

He admitted that the house allowance, when received, was more than sufficient to pay the rent of the house with which he provided himself, but he incurred the expense of a car in getting to and from his place of duty.

4. In addition to his salary, which was paid to him at the same rate as that payable for a like office or employment in the United Kingdom, the appellant received in the colony an allowance called "colonial allowance" at a rate fixed by the Admiralty with the concurrence of the Treasury for persons of the appellant's class or rank. This allowance was granted to meet the extra expenses of residence outside the United Kingdom.

5. The appellant's salary and allowances were paid under the following Admiralty regulations :—

263. When the rate of salary is not stated in the order appointing a person to a vacancy, the scale of salary previously allowed to the office is to be continued unless it has been previously ordered to be reduced on a vacancy.

264. Allowances in addition to civil salary to officers not borne on ship's books, such as fixed periodical sums for special services, are payable for the same period as salary, unless directed otherwise. Colonial allowances and allowances for house-rent are to be paid from the day the officer joins the establishment until the day he is discharged from its books, subject, however, in the case of colonial allowances to the limitations imposed by Article 278.

278. Colonial allowances, or allowances granted to meet increased cost of living, are payable to officers of Naval establishments abroad, during absence on ordinary or sick leave from the colony in which those establishments are situated, when they proceed to visit a place in a neighbouring country, but in the case of an officer who proceeds to the United Kingdom, payment of colonial allowance should cease on the date preceding that of arrival in the United Kingdom, and should recommence on the day following that of departure.

279. Officers of Naval establishments abroad who are entitled to house-rent allowances are to receive them when on temporary leave of absence.

6. The cash amounts received by the appellant in respect of his appointments in the United Kingdom and in the colony respectively for the years preceding the respective years of assessment to which the appeal related were :—

| | 1928–29. | | | 1929–30. | | | 1930–31. | | |
|---|---|---|---|---|---|---|---|---|---|
| | £ | *s.* | *d.* | £ | *s.* | *d.* | £ | *s.* | *d.* |
| Salary and Bonus . | 665 | 12 | 11* | 671 | 15 | 0 | 662 | 9 | 8 |
| House Allowance . | 6 | 16 | 11 | 111 | 16 | 11 | 57 | 13 | 10 |
| Colonial Allowance . | 316 | 12 | 8 | 495 | 16 | 8 | 473 | 19 | 2 |
| | 989 | 2 | 6 | 1,279 | 8 | 7 | 1,194 | 2 | 7 |

* 224*l.* 10*s.* 6*d.* in the United Kingdom ; 441*l.* 2*s.* 5*d.* in the colony.

7. The assessments appealed against were made to include the above amounts in full together with the annual value of the official house which the appellant occupied during part of his residence in the colony. The amount of such annual value was not disputed, being 64*l*. 9*s*. 8*d*. for the period to March 31, 1929, and 49*l*. 12*s*. 11*d*. for the period to November 6, 1929.

8. Before his departure from the United Kingdom, whilst he was abroad, and since his return to the United Kingdom, the appellant had belonged to the same class in the service of the Admiralty, and his salary throughout, as distinct from allowances, was the salary of his class. In his tenure of office in the colony he followed a predecessor and was followed by a successor. On taking up that office he vacated the office which he held in the United Kingdom, and he was followed therein by a successor.

9. No order had been made by the Treasury under r. 10 of Sch. E relating to the class of persons to which the appellant belonged.

10. The appellant contended :—

(i.) That he held an office or employment abroad, which he exercised wholly abroad, and that his income therefrom was not subject to taxation within the United Kingdom under Sch. E of the Income Tax Act, 1918 ;

(ii.) That in any case any value ascribed to an official house occupied by him abroad was not income taxable under Sch. E ;

(iii.) That in any case the colonial allowances and the house allowances payable to the appellant in the colony were not income chargeable to tax under Sch. E : or alternatively were deductible in computation of such income ;

(iv.) That he was entitled to deduct the cost of providing himself with housing accommodation for the period from June 15, 1930, to April 29, 1931, in arriving at the income (if any) chargeable to tax.

11. The Inspector of Taxes contended :—

(i.) That the appellant's official emoluments were subject to taxation under Sch. E of the Income Tax Acts ;

(ii.) That the value of an official house was taxable as falling within the words "salaries, fees, perquisites or profits whatsoever" appearing in r. 1 of Sch. E;

(iii.) That the colonial allowances and house allowances were taxable as falling within the same words;

(iv.) That the appellant was not entitled to deduct in arriving at the amount of the assessment any cost of providing himself with housing accommodation.

(v.) That the assessments were correct and should be confirmed with the exception that the assessment for 1930–31 should be reduced to 1329*l.*

12. The following cases amongst others were referred to before the Commissioners: *Proctor* v. *Ryall* (1); *Pickles* v. *Foster* (2); *Foulsham* v. *Pickles* (3); *Colquhoun* v. *Brooks* (4); *G. W. R. Co.* v. *Bater* (5); *Barson* v. *Airey* (6); *M'Donald* v. *Shand* (7); *Tennant* v. *Smith* (8); *Ricketts* v. *Colquhoun* (9); *Fergusson* v. *Noble* (10); *Nolder* v. *Walters* (11); *Sutton* v. *Commissioners of Inland Revenue* (12); *Cook* v. *Knott* (13); *Revell* v. *Directors of Elworthy Bros. & Co., Ld.* (14); *Cordy* v. *Gordon* (15); *Machon* v. *McLoughlin.* (16)

13. The Commissioners who heard the appeal gave their respective opinions in writing as follows:—

"In this case I have no doubt that income tax is not chargeable on the value of the official residence which was occupied by the appellant in Singapore. As regards the main question whether the tax is chargeable on his salary, and the colonial allowance, and the house allowance in lieu of

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(1) (1928) 14 Tax Cas. 204.

(2) [1913] 1 K. B. 174; 6 Tax Cas. 131.

(3) [1925] A. C. 458; 9 Tax Cas. 261.

(4) (1889) 14 App. Cas. 493; 2 Tax Cas. 490.

(5) [1922] 2 A. C. 1; 8 Tax Cas. 231.

(6) (1925) 10 Tax Cas. 609.

(7) [1923] A. C. 337; 8 Tax Cas. 420.

(8) [1892] A. C. 150; 3 Tax Cas. 158.

(9) [1926] A. C. 1; 10 Tax Cas. 118.

(10) 1919 S. C. 534; 7 Tax Cas. 176.

(11) (1930) 15 Tax Cas. 380.

(12) (1929) 14 Tax Cas. 662.

(13) (1887) 2 Tax Cas. 246.

(14) (1890) 3 Tax Cas. 12.

(15) [1925] 2 K. B. 276; 9 Tax Cas. 304.

(16) (1926) 11 Tax Cas. 83.

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residence, I have grave doubts as to the correctness of the official view. The case, however, is not one in which, in my opinion, I should press my colleague, who has formed a clear opinion, to withdraw that opinion in favour of the appellant, and I accordingly concur with him in confirming the assessment in principle on this main question.

W. J. BRAITHWAITE."

"The appellant is a deputy cashier on the permanent establishment of the Admiralty, and his remuneration is paid by the Admiralty out of moneys voted by Parliament. During the period under discussion his official duties were wholly performed in Singapore.

"It has always been the practice to charge income tax under Sch. E on the emoluments of all persons holding an office or employment of a permanent nature on the establishment of any Department of the Government of the United Kingdom, whether their duties were performed in the United Kingdom or elsewhere. The assessment of the appellant's remuneration is thus in accordance with a settled practice of ninety years' standing.

"The only cases in which the Courts have considered the question of the liability to assessment under Sch. E of persons performing their duties abroad have been those of officers or servants of companies. In *Pickles* v. *Foster* (1) the appeal was allowed on the ground that the word 'department' in s. 147 of the Act of 1842 (now r. 18 of the Rules applicable to Sch. E) could not be stretched so as to bring within the provisions of the section the officers or servants of a company. However extravagant the invocation of s. 147 may have been as an argument for maintaining the charge of the servant of a company performing his duties abroad, there is no indication in the judgment that the section would have been regarded as irrelevant if the question under consideration had been the liability of an officer in the employment of the Government. As is shown by the report in the Law Reports (2), the whole course of the argument on both sides proceeded upon the view that the emoluments of an office

(1) [1913] 1 K. B. 174; 6 Tax Cas. 131. (2) [1913] 1 K. B. 174, 179–181.

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or employment under a Government Department are clearly brought within the charge notwithstanding that the duties are wholly performed abroad, and the judgment contains nothing to cast doubt upon this view, but implicitly accepts it.

"In *Proctor* v. *Ryall* (1) it was held that a director of a company whose duties were mainly but not entirely exercised out of the United Kingdom held an office within the United Kingdom and was assessable by the Commissioners for the district where the registered office of the company was situated, quite independently of r. 18, which has nothing to do with companies. It is true that in reviewing the case of *Pickles* v. *Foster* (2) Rowlatt J. used words which seem to imply that the decision in that case had turned on the consideration that the rule was purely machinery and could only operate in the case of a person chargeable independently of it, but this passing observation can hardly constitute an authority for extending the decision to a class of employment distinguishable from that dealt with either in the case reviewed or in the case then before the Court.

"The question discussed in *Pickles* v. *Foster* (3) whether employment under a company 'is brought within the provisions of s. 147 so as constructively to make the office or employment one which is exercised within the United Kingdom, though the duties thereof are in fact wholly performed out of the United Kingdom,' does not arise in the case of a person holding an office or employment under a Government Department. If, as was assumed throughout the case, s. 147 or r. 18 can be looked to for assistance in interpreting the phrase 'public offices or employments of profit within the United Kingdom,' the rule is clearly applicable to such a person and supports the practice by its provision that he shall be assessed at the head office of the Department although the duties are performed elsewhere, whether within the United Kingdom or not. Further support for the official view could be found in the old s. 148 of the Act of 1842, which specially exempted any public office or

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(1) 14 Tax Cas. 204, 215.
(2) [1913] 1 K. B. 174, 179-181.
(3) [1913] 1 K. B. 174, 183; 6 Tax Cas. 131, 136.

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employment the duties whereof were necessarily and permanently performed in Ireland. Reference may also be made to s. 66, sub-s. 2 (*c*), of the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), reproduced in s. 5, sub-s. 3 (*b*), of the Income Tax Act, 1918, and s. 42, sub-s. 5, of the Finance Act, 1927 (17 & 18 Geo. 5, c. 10), which authorizes, for the purposes of super-tax and surtax, the deduction from the total income of an individual in the service of the Crown abroad of such sums as the Treasury may allow for expenses which in their opinion are necessarily incidental to the discharge of the functions of his office for which an allowance has not been made for the purposes of income tax.

"It is suggested that these provisions relate to officers in the Navy, the Army and the Air Force, and have no application to persons holding civil appointments. The argument could not have been used before 1918, and its acceptance now would involve the improbable assumption that an important change in the law was made by a slight alteration in the order of words (1) and the insertion of 'or by the officers' at the beginning of r. 6 of Sch. E in the consolidating Act, and that notwithstanding this change words of general description were retained in s. 5, sub-s. 3 (*b*), and r. 18, sub-r. 2, of Sch. E where a reference to those particular classes of officers would have been sufficient and more appropriate. It would even seem that if persons in the service of the Crown abroad were not chargeable under the Act of 1842, the provision in s. 147 of that Act as to duties performed out of Great Britain and s. 66, sub-s. 2 (*c*), of the 1909–10 Act had no meaning, and that officers on foreign service in the Navy, the Army and the Air Force were brought within the charge for the first time by the alteration of the wording of r. 6 of Sch. E in the Act of 1918.

"In my opinion s. 147 of the Act of 1842, though primarily a machinery section, cannot be ignored in interpreting the phrase 'public offices and employments of profit within the United

(1) The words of the third rule of Sch. E under s. 146 of the Income Tax Act, 1842, were: "The said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain; (videlicet) . . . ."

Kingdom'; as applied to offices and employments held under a Government Department. The Act of 1918 did not make any change of substance; the practice of charging officers under a Government Department though their duties are performed abroad is and always has been correct, and the assessment should be confirmed so far as it relates to the appellant's salary and the allowance received by him in cash. The inclusion in the assessment of the value of his official residence in Singapore appears to rest only upon a convention by which the value of such residence is treated as an emolument of office for the purposes of both taxation and pension, and this, in the case of residences abroad, cannot be supported in law for income tax, whatever may be the position as regards pension.

P. WILLIAMSON."

The Commissioners also held that no deduction could be made for expenses alleged to have been incurred by the appellant by reason of the cost or extra cost of housing or living in the colony. They amended the assessments to exclude the annual value of the official house which had been occupied by the appellant to the figures shown in para. 6 above.

The appellant required a case to be stated on all the matters which the Commissioners decided against him; there was a cross-appeal by the Inspector of Taxes as to the exclusion of the value of the official residence.

The questions of law for the opinion of the Court were:—

(*a*) Whether the appellant was assessable to income tax in respect of his office or employment in the colony;

(*b*) Whether the annual value of the official house which he occupied was assessable under Sch. E;

(*c*) Whether the allowances paid to him for a residence and extra cost of living were assessable under Sch. E;

(*d*) Whether he was entitled to deduct the extra cost of residence and of living as expenses;

(*e*) Whether he was entitled to deduct the expense of providing himself with housing accommodation for the period from June 15, 1930, to April 29, 1931.

Finlay J. affirmed the decision of the Special Commissioners, and following the decision in *Tennant* v. *Smith* (1) held (1.) that the appellant was liable to be assessed on his salary, colonial allowance, and allowance in lieu of a house. He thought, however (2.) that the value of the official residence was not income chargeable with tax, since it was not money, nor convertible into money by the appellant.

The appellant appealed on the first point, and the Crown cross-appealed on the second point. The appeal and cross-appeal were heard on December 1 and 4, 1933.

*Raymond Needham K.C.* and *Cyril King* for the appellant.
*Sir Donald Somervell S.-G.* and *R. P. Hills* for the Crown.

LORD HANWORTH M.R. This appeal has raised some interesting points which have been well presented to us, and the question that arises is: What is the right assessment to be made upon the present appellant under Sch. E ?

Now, it is important in this, as in all other tax cases, to have regard to the facts which are proved for our consideration. On July 19, 1928, the appellant, an established Civil Servant, left the United Kingdom, retaining no residence therein, to take up an appointment as deputy cashier in H.M. Naval Base at Singapore. This appointment was approved by the Lords Commissioners of the Admiralty in May, 1928, to date August 1, 1928. The official pay of the appellant as the holder of that appointment was payable to and received by him in the colony of the Straits Settlement from August 1, 1928, to July 24, 1931, during his residence in the colony. His official pay for the period from July 25, 1931, to September 30, 1931, during his return voyage from the Straits Settlement and during subsequent leave of absence granted in respect of his service in the colony was payable and was paid to him in London except for the sum of 52*l.* which he received as an advance in the colony. The appellant landed in the United Kingdom on his return thereto on September 22, 1931. Since October 1, 1931, he has served as deputy cashier at H.M. Torpedo Factory, Greenock,

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(1) [1892] A. C. 150.

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to which he was appointed (his appointment to date October 1, 1931) in August, 1931. From July 19, 1928, until October 1, 1931, the appellant was not resident in the United Kingdom. Now, he says that, by reason of that fact, that he was not resident in the United Kingdom, that his employment was outside the United Kingdom, he ought not to be rendered liable to income tax. The principles of *Colquhoun* v. *Brooks* (1) and so on are invoked to say : " Here is a man who was outside the Kingdom ; his employment kept him outside, and he cannot, therefore, be liable to pay income tax."

There is a subsidiary point upon which the Crown enter a cross-appeal, that during the time he was at Singapore, or rather a portion of the time, he had an official house provided for him, which he occupied, and the terms on which it was occupied were " that it was not to be let in whole or in part to any person whatsoever." During the time that he was at Singapore he received certain other allowances ; he received an allowance which is called a " colonial allowance," and also an allowance for house rent during part of the time when he was not occupying the official house. Mr. Needham agrees that these allowances (colonial allowances, or allowances granted to meet the increased cost of living, or allowances in respect of housing when he was not occupying the official residence) are allowances in respect of which the appellant is to be charged, or not to be charged, in accordance with whether he is liable, or not liable, on the main point which Mr. Needham has argued before us.

I turn, therefore, to consider whether or not he is liable to pay income tax, when having his residence abroad. Sch. E is the schedule which applies the income tax to persons who are holders of office or who are officers brought within its terms. Sch. E says this : " Tax under Schedule E shall be charged in respect of every public office or employment of profit, and in respect of every annuity, pension, or stipend payable by the Crown or out of the public revenue of the United Kingdom, other than annuities charged under Schedule C, for every twenty shillings of the annual amount thereof." It

(1) 14 App. Cas. 493 ; 2 Tax Cas. 490.

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will be observed that that schedule purports to bring within its ambit public offices, employments of profit, and, apparently, pensions and stipends payable out of the public revenue. We have in the present case to deal with a person who was employed in an office. It is not claimed that he is otherwise than the holder of an office, and the office that he held was the office of deputy cashier in His Majesty's Naval Base at Singapore. The wide words of Sch. E, as they stand, deal with "every public office." But we then have certain rules which are explanatory of Sch. E.

I do not assent at all to the doctrine that some rules can be taken to be machinery and, therefore, of less moment or authority than some others. It appears to me that we have to look at the rules applicable to Sch. E, each and all of them, as forming a part of the statute under which income tax is levied, and that we have no right to determine for ourselves a priori what is the scheme, or ought to be the scheme, of the Income Tax Acts. We have no means of informing ourselves what the scheme is otherwise than by observing the actual terms of the Act itself. I therefore look at r. 1, and there find "Tax under this Schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule"—I need not go beyond that—"in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment." Now that gives one a little more insight into what the meaning of the broad terms of the schedule is: it says, "every person having or exercising an office or employment of profit mentioned in this Schedule." What are the offices of profit or employments of profit mentioned in this schedule? We then have to go to still another rule, r. 6, which says: "The tax shall be paid in respect of all the public offices and employments of profit within the United Kingdom"—and the words of the rule go on, "or by the officers hereinafter respectively described," and it is perhaps of importance to take note that under the letters of the alphabet, which run from (*a*) to (*k*), it will be found that three of them do refer to certain "officers in His Majesty's navy," "commissioned officers in His Majesty's military forces," "commissioned officers in His Majesty's air force," whereas the other letters all refer to certain offices and not to persons. I am concerned to see whether or not this office which was held by Mr. Corry was an office of profit within the United Kingdom. Now, for the purpose of finding that out, there is r. 18, and I cannot say to myself that r. 18 is entirely subsidiary to r. 1 or r. 6. It appears to me that these rules are to be found, each in progress making clear the steps that are required for the elucidation of the schedule generally. Rule 18, sub-r. 2, says: "A person chargeable in respect of an office or employment of profit shall be deemed to exercise it at the head office of the department under which it is held, and shall be assessed and charged at that head office, although the duties of the office or employment are performed, or any profits thereof are payable elsewhere, whether within the United Kingdom or not." That seems to afford the key to what is meant by the words "offices and employments of profit within the United Kingdom," which is just the very point upon which one wanted further elucidation, and it definitely says that such a person, if he is within r. 18, sub-r. 2, is to be assessed and charged at that head office. Here there is a head office, because the appellant is an established Civil Servant appointed by the Lords Commissioners for exercising the office of the Lord High Admiral. It says that although the duties are performed elsewhere, and although the profits are payable elsewhere—payable, it may be, in the shape of a colonial allowance—whether within the United Kingdom or not, such a person is to be charged at the head office, and he is to be deemed to exercise his office at the head office. Now what is the answer that is suggested to the applicability of that rule? It is only these words, "a person chargeable," and it is said that you must not look at the rule until you have found that you have got a person chargeable. There are two answers to that, to my mind, either of which is sufficient for the present case. "A person chargeable" is a proleptic expression, and when you have made use of the rule you will find then that he is brought within the charge by reason of the office

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which is deemed to be exercised at the head office of the department, or it may be that you are dealing there with a person who is the holder of an office as contradistinguished from the persons who are dealt with under the letters to which I have already referred, (*d*), (*e*) and (*f*) in r. 6.

Upon the whole it is sufficient for the present purpose—and I am quite satisfied to accept the interpretation suggested—that "a person chargeable" is a proleptic expression. I think it would be almost pedantic to limit the words of sub-r. 2 of r. 18 to those persons who have hitherto been found to be chargeable.

But I have indicated another interpretation which can be given to the rule. If the view that I have preferred is right, we find that you must look at the employment as one which, although not in fact exercised, is to be deemed to be exercised at the head office, and then it will be found that all the machinery of the Act works well enough, because, of course, as indicated under the rules to which we have referred, the tax is exacted by means of the deductions from the pay and allowances granted to the office holder. We have, then, a direction that such a person so exercising his employment abroad, but deemed to be exercising it at the head office of the department—which is the Admiralty—is to be chargeable in respect of all profits which are payable to him elsewhere. Those two words really answer another point put by Mr. Needham, that if you are to deem that Singapore for this purpose is London, you cannot deem that the allowances paid to him by way of a colonial allowance, or the like, are also to be brought under the purview of what goes on in London, for their very character is that they are a colonial allowance, a presumption being involved that he is employed away from London. There is no difficulty about that. Once a person is to be assessed, you must carry out your assessment in accordance with the rule, and the actual facts are no longer really the touchstone of what is to happen, because this sub-rule says that "A person chargeable in respect of an office or employment of profit shall be deemed to exercise it at the head office"—"deemed" being a word which necessarily is in contradiction to the actual facts of the case. Under those circumstances it appears to me that the appellant is liable. It is said that these words, to which I have referred, in sub-r. 2 of r. 18 can be sufficiently accounted for if you are considering the case of a man who, employed at home, from time to time is sent on temporary journeys or temporary employment outside the United Kingdom, and that such temporary employment or temporary journeys are not to break his employment or make it otherwise than exercised over here. But I know of no reason why I should put that limited meaning upon sub-r. 2; I know of no right to assume that that was the purpose. I have to take the words as they are, and these words of sub-r. 2 are words of old standing, for they are to be found in s. 147 of the Income Tax Act, 1842. The fact that they were of wide import and intended to cover a wide area is to my mind illustrated by the fact that in s. 148 of that Act you had the withdrawal of Ireland from the possibility of being included in the construction to be placed on s. 147.

Now that seems to me to answer the main question. I therefore pass now to the cross-appeal in which the Crown says that in this case the official residence occupied by Mr. Corry was a part of his perquisites or profits which he received as holding this office. Here I think it is important to bear in mind what has been found by the Commissioners in fact. Mr. Braithwaite said: "I have no doubt that the income tax is not chargeable on the value of the official residence which was occupied by the appellant in Singapore." And Mr. Williamson said: "The inclusion in the assessment of the value of this official residence in Singapore appears to rest only upon a convention by which the value of such residence is treated as an emolument of office for the purposes of both taxation and pension, and this, in the case of residences abroad, cannot be supported in law for income tax, whatever may be the position as regards pension." It appears to me, therefore, that if this question of what was the real tenure of this house by Mr. Corry was a question of fact, those facts have been found against the Crown by the Commissioners, and that after, to my mind, correctly directing themselves in law. If it is to be taken as a pure question of law, then I think that *Tennant* v. *Smith* (1) is directly against the contention of the Crown.

We must bear in mind that we are told in the Case that the condition of the occupation of an official house was "that it was not to be let in whole or in part to any person whatsoever"; that means, in other words, that Mr. Corry could not himself make any profit out of it. To the extent to which it afforded lodging to himself or his family it was an asset, but no more. In *Tennant* v. *Smith* (1) I do not think the decision turns upon whether or not Sch. A tax had been paid by some one else in respect of the house occupied by the bank manager. Lord Halsbury said (2); "The thing sought to be taxed is not income unless it can be turned into money," and Lord Watson said (3): "I do not think it comes within the category of profits, because that word, in its ordinary acceptation, appears to me to denote something acquired which the acquirer becomes possessed of and can dispose of to his advantage—in other words, money—or that which can be turned to pecuniary account." Lord Macnaghten said (4): "On examining that schedule it became obvious that it extends only to money payment or payments convertible into money." It appears to me that those words of Lord Halsbury, of Lord Watson, and of Lord Macnaghten definitely indicate that you have to consider what could be turned into money, that when you bear in mind this limited power over the house which Mr. Corry had, there is a negation of treating that official residence as a valuable asset which ought to be brought into the table of the salary, fees, perquisites, or profits, for which Mr. Corry is liable to be taxed under Sch. E.

For these reasons it appears to me that both the appeal and the cross-appeal fail, and they must both of them be dismissed with such costs as are appropriate to the issues which are raised in them.

SLESSER L.J. I am of the same opinion. I think that sub-r. 2 of r. 18 is wide enough to cover the case where all the

(1) [1892] A. C. 150.
(2) Ibid. 157.
(3) Ibid. 159.
(4) Ibid. 163.

duties of the office or employment are performed outside the United Kingdom. The words material to this are, " although the duties of the office or employment are performed, or any profits thereof are payable elsewhere, whether within the United Kingdom or not," and I find it quite impossible to limit those words, as Mr. Needham has asked us to do, to cases where the duties are occasional or partial and not whole. Now here on the facts it is clear that this gentleman did perform the whole of his duties outside the United Kingdom, and I find it very difficult to understand, once it is assumed that the whole of the duties are performable outside the United Kingdom, how it can possibly be said that such a person is not " a person chargeable " under the schedule, and yet give a meaning to the rule at all. Mr. Needham was himself oppressed by this difficulty ; he sought to escape from it by saying : " Oh, it may well be that this sub-r. 2 applies to cases where a person is in a public office within the United Kingdom, but has occasional duties outside it." As I say, I see no reason for limiting the construction in that way. If, therefore, the construction be applied generally to persons whose duties are outside the United Kingdom, the direction is that such a person shall be deemed to exercise his office at the head office and be assessed and charged at the head office. By the opening words of Sch. E : " Tax under Schedule E shall be charged in respect of every public office," and by r. 6 the tax is to be paid in respect of all public offices within the United Kingdom. That, by itself, might or might not be sufficient to bring this gentleman within its operation. It might conceivably be said that in so far as he was appointed an established Civil Servant in this country, he was within the United Kingdom, although his duties, within the contemplation of sub-r. 2 of r. 18, were not so within the United Kingdom. I do not think it is necessary to decide that point, but I would like to say, in order to guard myself, that I do not at the moment accept what is said by Finlay J. in the present case where he says (1) : " I assent to the view that if the charging Schedule itself is not wide enough to cover an office held under the Admiralty where,

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(1) [1933] 2 K. B. 521, 532.

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in fact, the duties of the office are performed outside the United Kingdom, this machinery section will not suffice to bring it into charge."

Cases may come before the Court for consideration where officers chargeable under Sch. E do not serve under any head office of any department, so as to bring them within the ambit of r. 18, sub-r. 2. When those cases come up for consideration it will have to be decided whether they are not covered by r. 6 of Sch. E, irrespective of the assistance of r. 18, sub-r. 2. As I say, I wish to keep that point open. But, on the point which we have to consider—namely, the application of r. 18, sub-r. 2, in my opinion that rule applies directly to this Civil Servant as employed by the Commissioners of the Admiralty, and he therefore, being a person who is to be deemed to exercise his office at the head office of the department under which he is employed and to be assessed and charged at that office, falls in any event directly owing to that notional assessment of charge at the head office within r. 6 and consequently within the ambit of the whole schedule.

I do not say anything on the cross-appeal beyond saying that I agree with the reasons which my Lord has given why it should be dismissed.

ROMER L.J. I agree, and have very little to add. Personally, can only read r. 18, sub-r. 2, of the Rules applicable to Sch. E as meaning that a person who holds an office or employment under one of the Government departments is to be deemed for the purposes of the schedule to exercise it at the head office of the department, whether in fact his duties are performed outside the United Kingdom or not. The only possible difficulty, I think, in applying that construction is the fact that the sub-rule begins with the words: "A person chargeable." But there is no reason that I can see why "a person chargeable" should not mean a person who, looking at all these rules as a whole, is chargeable, including the rule itself which commences with these words.

As regards the cross-appeal by the Crown, I only desire to point out this. The Solicitor-General called our attention to

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several passages in the speeches of noble Lords in the case of *Tennant* v. *Smith* (1) in which they referred to Sch. A, but it was necessary that they should deal with Sch. A because the appellant was asserting that his income from all sources did not exceed 400*l*. Lord Macnaghten points out that for the purpose of ascertaining whether his income from all sources did or did not exceed 400*l*, there would have to be taken into consideration any property in respect of which he was taxable under Sch. A or Sch. B. He examines the facts of the case, comes to the conclusion that the gentleman was not chargeable under Sch. A or Sch. B, and then goes on to say that, unless he can be brought under Sch. A or Sch. B, his occupation of the property in question was immaterial. Now, in the present case the gentleman's occupation of this property is immaterial, because it cannot be brought under Sch. A or Sch. B, the property being situated outside this country.

For these reasons, in addition to those which have been given by my Lords, I agree with the order that the Master of the Rolls has mentioned.

*Appeal and cross-appeal dismissed.*

Solicitors : *Linklaters & Paines* ; *Solicitor of Inland Revenue.*

W. I. C.

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(1) [1892] A. C. 150.

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Dec. 1, 6.

# PERRY (INSPECTOR OF TAXES) *v.* ASTOR.

*Revenue—Income Tax—Foreign Securities—Stocks and Shares—Trust Deed—Income payable to Settlor—Power of Revocation reserved by Settlor in favour of himself—Foreign Trustee—Balance of income paid to Beneficiary—Liability of Beneficiary to Income Tax—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case V., rr.* 1, 2*—Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 20, *sub-s.* 1 (*a*).

The respondent, who was a British national resident in this country, became absolutely entitled on coming of age in 1928 to certain American stocks and shares. By a settlement made in 1929 he transferred these shares to an American trust company as trustee to hold upon the trusts therein mentioned. The settlement provided that the trustee should collect the income arising from the trust estate, and, after paying the taxes and other incidental expenses and charges, should pay or apply the balance of the income to or for the benefit of the respondent during his life. Power was reserved to the respondent at any time during his lifetime by instrument under his hand and seal to revoke the settlement and trust thereby created concerning all or any part or parts of the trust fund whether capital or income, or to change or modify the same in any or to any effect which he might think fit or proper. The respondent was assessed to income tax under r. 1 of Case V. of Sch. D of the Income Tax Act, 1918.

The respondent appealed against the assessment, which was reversed by the Commissioners. On appeal the decision of the Commissioners was affirmed by Finlay J., following his own decision in *Marchioness of Ormonde* v. *Brown* (1932) 17 Tax Cas. 333. It was agreed for the purposes of the appeal:—(*a*) That the trust settlement was governed by the law of New York State. (*b*) That on a proper construction of the trust settlement under such law the respondent had no proprietary interest, legal or equitable, in either the specific assets comprising the corpus of the trust or the specific dividends or interest collected by the trustee; the whole legal and equitable proprietary interest therein was vested in the trustee, and the sole right in the respondent was the right in equity to enforce performance of the trust against the trustee. (*c*) That under New York law the provision in the trust settlement reserving to the respondent a power of revocation was valid, but had no effect at all on the nature of the rights accruing under the settlement to the trustee and respondent respectively.

On appeal by the Crown:—

*Held* (reversing the decision of Finlay J.), that as the respondent was able, without the consent of any other person, by means of the exercise of the power of revocation reserved by the settlement, to obtain for himself the beneficial enjoyment of the whole of the income arising from the specific stocks and shares comprising the trust fund, such income must under s. 20, sub-s. 1 (*a*), of the Finance Act, 1922, be deemed for the purpose of income tax to be his income; and that the assessments had rightly been made under r. 1 of Case V. of Sch. D and ought to be confirmed.

*Marchioness of Ormonde* v. *Brown*, 17 Tax Cas. 333 overruled on the first point that arose in that case.

APPEAL from a decision of Finlay J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on March 13, 1933, for the purpose of hearing appeals, the Hon. W. W. Astor (hereinafter called "the respondent") appealed against assessments to income tax in the sums of 23,809*l.* for the year ending April 5, 1930, 23,809*l.* for the year ending April 5, 1931, and 25,245*l.* for the year ending April 5, 1932, made upon him by the Additional Commissioners of Income Tax for the Division of St. James under Case V. of Sch. D of the Income Tax Acts in respect of income from possessions out of the United Kingdom.

2. The respondent was resident in the United Kingdom, and was a grandson of the first Lord Astor, and under a settlement made by Lord Astor, dated May 25, 1916, became absolutely entitled, upon coming of age in August, 1928, to certain American stocks and shares.

3. By a settlement, dated September 13, 1929, the respondent transferred those stocks and shares to the City Bank Farmers Trust Company (the trustee) to be held on the trusts therein set out.

4. It was provided by clauses 3 and 4 of the settlement that the trustee should collect the income arising from the trust estate and after paying the taxes and other incidental expenses and charges properly chargeable against income should pay or apply the balance of the income to or for the use of the respondent during his life in such amounts and at such dates as he might from time direct, and that upon the death of the respondent the trustee should distribute the capital of the trust fund then in its possession to such persons and in such shares or amounts and on such terms and limitations as the respondent should by any will or codicil appoint and in default of such appointment to the issue of the respondent then surviving in equal shares per stirpes, and should he leave no issue to the descendants of his father living at his death in equal shares per stirpes. By clause 9 power was reserved to the respondent at any time or times during his lifetime

by instrument under his hand and seal to revoke the settlement and the trust thereby created concerning all or any part or parts of the trust fund, whether capital or income, or to change or modify the same in any or to any effect which the respondent might think fit or proper.

5. It was agreed for the purposes of the present appeal:—

(*a*) that the trust settlement was governed by the law of New York State;

(*b*) that upon the proper construction of the trust settlement under such law the respondent had no proprietary interest legal or equitable in either the specific assets comprising the corpus of the trust or the specific dividends or interest collected by the trustee; that the whole legal and equitable proprietary interest therein was vested in the trustee, and that the sole right in the respondent was the right in equity to enforce specific performance of the trust against the trustee and in particular to call upon him to pay over (at such times as the respondent might direct) the balance of income in the trustee's hands, after deducting outgoings from the dividends and interest so collected, and

(*c*) that under such law the provision in the said trust settlement reserving to the respondent a power of revocation was valid but (unless and until such power was exercised) had no effect at all on the nature of the rights accruing under the settlement to the trustee and respondent respectively as explained in (*b*) above.

6. The respondent had not during the material years exercised the power of revocation reserved to him by clause 9 of the settlement or made any appointment affecting the trust fund or any part thereof.

7. The assessments under appeal had been made under r. 1 of Case V. of Sch. D on the basis that the whole of the income arising from the stocks and shares comprising the trust fund must be deemed for the purpose of income tax to be the income of the respondent under s. 20, sub-s. 1 (*a*), of the Finance Act, 1922, on the ground that he could without the consent of any other person have obtained for himself the beneficial enjoyment thereof.

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8. It was contended on behalf of the respondent :—

(*a*) That the income of the trust fund was income of the trustee, who was resident abroad, and was derived from sources out of the United Kingdom, and was therefore not within the ambit of the Income Tax Acts, and s. 20, sub-s. 1 (*b*), of the Finance Act, 1922, had no application to it. Reference was made to the decision in *Marchioness of Ormonde* v. *Brown.* (1)

(*b*) That the respondent was not or at least might not have been able to obtain for himself the beneficial enjoyment of the income without the consent of the trustee.

(*c*) That s. 20, sub-s. 1 (*a*), of the Finance Act, 1922, could not be applicable to the case, as the respondent was already in beneficial enjoyment of the income under the settlement without exercising any powers of revocation or other powers thereunder, whereas the sub-section contemplated only persons who were not in beneficial enjoyment of the income for the time being and could only become so by exercising such a power of revocation or other power.

(*d*) That as from the date of the settlement the respondent was chargeable to income tax under r. 2 of Case V. of Sch. D on the amounts received in the United Kingdom, and the assessments ought to be amended accordingly.

9. It was contended on behalf of the Crown :—

(*a*) That the income of which the respondent had the beneficial enjoyment under the settlement was not the income arising from the specific stocks and shares comprising the trust fund but was income from a possession other than stocks and shares.

(*b*) That the respondent was able, without the consent of any other person, by means of the exercise of the power of revocation reserved by the settlement, to obtain for himself the beneficial enjoyment of the whole of the income arising from the specific stocks and shares comprising the trust fund.

(*c*) That such income was within the ambit of the Income Tax Acts, and under s. 20, sub-s. 1 (*a*), of the Finance Act, 1922, must be deemed for the purposes of income tax to be his income.

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(1) 17 Tax Cas. 333.

(*d*) That the assessments had rightly been made under r. 1 of Case V. of Sch. D, and ought to be confirmed.

10. The Commissioners, who heard the appeal, held that the matter was concluded by the decision in *Marchioness of Ormonde* v. *Brown* (1), and that s. 20, sub-s. 1 (*a*), of the Finance Act, 1922, could not be applied so as to charge the respondent with income tax on foreign income which under the provisions of the settlement was income of the American trustee. They accordingly amended the assessments by substituting amounts computed under r. 2 of Case V. for those computed under r. 1 as from the date of the settlement.

Finlay J. dismissed the appeal from the decision of the Commissioners on the same ground as that stated by them.

The Crown appealed. The appeal was heard on December 1, 1933.

*Sir Thomas Inskip A.-G.*, *J. H. Stamp* and *R. P. Hills* for the appellant.

*Latter K.C.* and *Cyril King* for the respondent.

*Cur. adv. vult.*

Dec. 6. LORD HANWORTH M.R. This is an appeal by the Attorney-General in a case decided by Finlay J. in favour of the respondent.

The facts are these. Mr. Astor is a national of this country and is resident in the United Kingdom. He became entitled, upon his coming of age in August, 1928, to certain American stocks and shares, and by a settlement which he made after he had become thus absolutely entitled, dated September 13, 1929, he transferred these stocks and shares to a trust company in New York, and that trust company, as trustee, holds the stocks and shares upon the trusts set out in the deed which is attached to the Case.

By the terms of the trust, the trustee is directed to collect the income arising from the trust estate thus placed in his hands and then, after paying taxes and other incidental

(1) 17 Tax Cas. 333.

expenses and charges properly chargeable against income, he is to apply and pay the balance of the income to or for the use of Mr. Astor during his life at such dates and in such amounts as he from time to time may direct.

It is agreed, for the purposes of the present appeal, that the trust settlement is governed by the law of New York State, and, secondly, that upon the proper construction of the trust settlement under that law, the respondent has no proprietary interest, legal or equitable, either in the specific assets comprising the corpus of the trust or the specific dividends or interests collected by the trustee, and the whole legal and equitable proprietary interest therein is vested in the trustee, and that the sole right that the respondent has is the right in equity to enforce performance of the trust against the trustee, and, in particular, to call upon him, at such times as Mr. Astor may direct, to pay over to him the balance of the income in the trustee's hands after these deductions of outgoings; and, thirdly, that under the law of New York State, the provision in the trust settlement reserving to Mr. Astor a power of revocation is valid but, unless and until it is actually exercised, it has no effect on the nature of the rights accruing under the settlement to the trustee and the respondent respectively.

It is important to clear away some points which have been argued and which those facts make it impossible to accept. For instance, we were referred to *Greenwood* v. *F. L. Smidth & Co.* (1) That was a case in which persons carried on business in a foreign country. They rented an office in London, it is true, but the contracts which were finally made were made in Copenhagen, and that was the place where in effect the business was carried on. I have referred to the fact that the respondent to this appeal is a national and is resident in this country, clearly within the purview and ambit of the Income Tax Acts.

Another case to which I will refer is *Whitney* v. *Inland Revenue Commissioners* (2), which concerns the question of

(1) [1922] 1 A. C. 417; 8 Tax Cas. 193.
(2) [1926] A. C. 37; 10 Tax Cas. 88.

whether it is possible to serve a notice requiring a return of income for super-tax outside the United Kingdom, on a person who was a citizen of and domiciled and resident in the United States.

The last cases to which I will refer are the two *Archer–Shee* cases—*Baker* v. *Archer-Shee* (1) and *Archer-Shee* v. *Garland.* (2) In the first case, by a majority, the decision turned upon the supposed fact that the beneficiary had a definite interest in the stocks and shares and the income arising therefrom. I say by a majority because it ultimately turned out that the law as it was supposed to be, was not in accordance with the supposition ; and in the second *Archer-Shee* case (2) it was determined that the income which came to the estate for which Sir Martin Archer-Shee had to make the return, was income held in the hands of a trustee, the trustee had to remit the balance of the income, and he had an absolute discretion as to the application of the income, and that there was no right in the beneficiary to any specific dividends or interest at all. Lord Dunedin points out that the view which commended itself to the majority in the first case was, upon the facts as ultimately ascertained, wrong, and the true view was that which was stated by Lord Sumner (3) when he held this : " Lady Archer-Shee . . . . does not, for income tax purposes, in my view own and is not entitled to any of the stocks, shares, securities or real property that form part of the New York trust estate. These belong to the trustee company, to whom also the annual payments made in respect of them, by way of rent, interest or dividends, ' arise,' ' accrue ' and ' belong.' All that she has is a right, in the forum of the trustee and of the trust fund, to have the trust executed in her favour under an order to be made for her benefit by the appropriate Court of equity, and this ' possession ' neither consists in the trust's investments or any of them, nor is situated here. It is ' foreign '."

The question we have to determine is whether in respect of this income so received by a resident in this county it is to be dealt with and charged under r. 1 or r. 2 of Case V. of Sch. D? It will be remembered that Case V. deals with tax in respect of income arising from possessions out of the United Kingdom. Rule 2 of Case V. provides: "The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom." The exception to the rule, "other than stocks, shares or rents," is introduced because the tax in respect of income arising from stocks, shares or rents, is separately dealt with in r. 1; and in such cases if the income arises from stocks, shares or rents in any place out of the United Kingdom the tax is to be computed on the full amount thereof, whether the income has been or will be received in the United Kingdom or not.

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(1) [1927] A. C. 844 ; 11 Tax Cas. 749.

(2) [1931] A. C. 212 ; 15 Tax Cas. 693.

(3) [1927] A. C. 844, 856 ; 11 Tax Cas. 749, 771.

It is abundantly plain, therefore, that it is important to consider, for the purpose of answering the question in the Case, whether or not the income that is received arises from stocks, shares or rents, when the payment is to be made in respect of the full amount thereof, or whether the income is one arising from possessions other than stocks, shares or rents, and is to be computed only on the full amount of the sums actually received in the United Kingdom.

Mr. Latter, for the respondent, argues that all that is payable is tax upon the amount received of the actual sum sent over to this country, and he invokes the principle of *Archer-Shee* v. *Garland* (1) and he says that as the matter stands at present, all that Mr. Astor is receiving is a sum which is remitted to him after there has been deduction by the trustee of the taxes and other incidental expenses and charges properly chargeable against the income, and he says that under the agreed law stated in para. 5, the respondent had no proprietary interest, legal or equitable, either in the specific assets comprising the corpus, or the specific dividends, and hence it is an *Archer-Shee* case. (1)

That does not, however, conclude the matter. We have to take into account that there is a section in the Finance Act,

(1) [1931] A. C. 212.

1922, s. 20, which deals with such cases. It must be remembered that although at the time that *Colquhoun* v. *Brooks* (1) was decided, the purview and the scope of the income tax was limited to what may be called a territorial area, there has in recent years been legislation which has imposed upon those who can be reached by the income tax, such as a national resident over here, a liability in respect of what may be broadly called foreign possessions. As Lord Blanesburgh says in *Baker* v. *Archer-Shee* (2): "In 1914, with what almost seems an arbitrary exception, such income arrived at as is prescribed in the statute of that year is now taxed whether received in this country or not."

Sect. 20 of the Finance Act, 1922, is a section which was passed in accordance with the policy under which a liability is imposed on the nationals of this country to pay even where the income may not be received by them directly from the source. The section reads, leaving out the immaterial words, "(1.) Any income—(*a*) of which any person is able, or has, at any time since the fifth day of April, nineteen hundred and twenty two, been able, without the consent of any other person by means of the exercise of any power of appointment, power of revocation or otherwise howsoever by virtue or in consequence of a disposition made directly or indirectly by himself, to obtain for himself the beneficial enjoyment . . . . shall . . . . be deemed for the purposes of the enactments relating to income tax (including super-tax) to be the income of the person who is or was able to obtain the beneficial enjoyment thereof"; and, as I have already pointed out, there was in this settlement a power of revocation which was valid, and, although it has no effect until it is exercised, it stands as a good and effective weapon to be taken into the hand of Mr. Astor at any time when he so pleases. It is, therefore, under this section, something which was not his income prima facie but is now to be deemed to be his income if the provisions of the section are satisfied; and by the very terms that I have read under sub-clause (*a*), if the

(1) (1889) 14 App. Cas. 493; 2 Tax Cas. 490.

(2) [1927] A. C. 844, 879; 11 Tax Cas. 749, 789.

fact be that he is able by means of the exercise of a power of revocation to obtain for himself the beneficial enjoyment, that brings into his income by the word "deemed" what otherwise lies outside it.

The answer that is suggested to the plain words of the section is that Mr. Astor is already in enjoyment of the income and therefore the section cannot apply. But this is in contradiction of the decision in *Archer-Shee* v. *Garland* (1) where the effect of the American law agreed as applicable here was considered. Hence that answer suggested will not do, and we must come back again to the plain words of the section.

Then it is said the section does not cover income which is not already taxable and that sufficient interpretation of user can be given to the section when you consider that it is possible to deflect the income from one person to another. That suggested interpretation and purpose of the section seems entirely untenable when emphasis is laid upon the word "deemed." That word makes it plain that you are then going to neglect the actual facts and to deduce or infer from those actual facts a result which does not directly and immediately flow from them.

It appears to me that the section is intended to bring within the purview of the income tax receipts of a person liable to income tax, receipts which, without that section, would not come within the purview of the income tax, but which by virtue of that section are to be deemed to be his income although in fact they are not at the moment.

It is plain on the facts of this case that there is a power in the respondent to exercise this power of revocation. It is a valid power that has no effect until it is exercised, but it is a power which can be exercised without let or hindrance from any other person, and can be exercised so as to secure to the respondent the beneficial enjoyment of the income derived from the dividends payable from the stocks and shares now held by the trustee.

For these reasons, it appears to me that s. 20, sub-s. 1 (*a*) applies to the present case, that the cases which have been

(1) [1931] A. C. 212; 15 Tax Cas. 693.

referred to do not apply to the case of this national resident over here, and that the appeal, therefore, must be allowed and an order made that the respondent is liable to the full assessment.

The effect of this decision is inconsistent with what was decided in *Marchioness of Ormonde* v. *Brown* (1), which was followed by the Commissioners, and which perhaps stood in the way of a different decision by Finlay J. That case is not consistent with the present decision, and that case must be treated as overruled upon this point. There was another point which was dealt with in that case which may justify the decision; but so far as the principle we are engaged in considering was contained in *Marchioness of Ormonde* v. *Brown* (1), our view on that point will, of course, prevail.

For these reasons, the appeal must be allowed with costs and the assessments made.

SLESSER L.J. I am of the same opinion. In the present appeal Finlay J. has not delivered a separate judgment, because he has conceived that the incidents of this case, so far as they are material to his decision, are the same as those which had to be considered in *Marchioness of Ormonde* v. *Brown* (1). and although, as my Lord has pointed out, there were other matters which had to be considered in that case so far as the subject matter of this case is concerned, it is, I think, in all materials, indistinguishable from that case. In that case we have the benefit of Finlay J.'s reasons why he came to the conclusion that, as in this case, the person who has sought to be taxed could avail himself of r. 2 of Case V. and say that he was only liable to tax in respect of the actual sums annually received in the United Kingdom on the ground that the income was other than from stocks, shares or rents.

The question which we have here to consider is whether the income received by Mr. Astor falls under r. 1 or r. 2 of Case V. As I have indicated, in this case, as in *Marchioness of Ormonde* v. *Brown* (1), there was in the trust deed a power of revocation given to the settlor. In *Archer-Shee* v. *Garland* (2), there was no such power of revocation, but apart from that the law which governed the trust in that case, which was the law of Ohio, which was also the law governing *Marchioness of Ormonde* v. *Brown* (1) appears, it is conceded, to be similar to that of the law of New York, and I deal with the legal position created by the trust upon that assumption.

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(1) 17 Tax Cas. 333.

(2) [1931] A. C. 212; 15 Tax Cas. 693.

There is no doubt to my mind that if in the present case and if in *Marchioness of Ormonde* v. *Brown* (1) there had been no power of revocation, the decision in the *Archer-Shee* case (2) would certainly have led to this result: that the income would have been income other than from stocks and shares and would therefore fall to be computed only on the actual sum annually received in the United Kingdom. The reason for that I do not cite from all the speeches of their Lordships in the second *Archer-Shee* case (3), but it is stated very succinctly by Lord Tomlin when he says in that case: "The appellant's wife has no property interest in the income arising from the securities, stocks and shares constituting the trust fund but has only a chose in action available against the trustees."

The problem therefore which arises is whether the power of revocation which is contained in the present instrument and which has not in fact been exercised, operates to take the case out of r. 2 and bring it into r. 1, so that the income should be treated as an income arising from stocks and shares, in which case the full amount thereof is exigible to taxation, or whether it should be treated as income other than from stocks, shares or rents.

The solution of that question depends upon a proper construction of s. 20 of the Finance Act, 1922, which provides that: "(1.) Any income—(*a*) of which any person is able, or has, at any time since the fifth day of April, nineteen hundred and twenty-two, been able, without the consent of any other person by means of the exercise of any power of appointment, power of revocation or otherwise howsoever by virtue or in consequence of a disposition made directly or indirectly by himself, to obtain for himself the beneficial enjoyment . . . . shall . . . .

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(1) 17 Tax Cas. 333.
(2) [1931] A. C. 212; 15 Tax Cas. 693.
(3) [1931] A. C. 212, 222; 15 Tax Cas. 693, 735.

be deemed for the purposes of the enactments relating to income tax (including super-tax) to be the income of the person who is or was able to obtain the beneficial enjoyment thereof."

There is no doubt in my mind that Mr. Astor does come exactly within the language of that section. He is a person who by the exercise of a power of revocation can obtain for himself the beneficial enjoyment. My Lord has referred to the argument of Mr. Latter that the respondent always had the beneficial enjoyment and therefore cannot be said to have obtained it by the exercise of a power of revocation, and my Lord has pointed out, and I respectfully agree, that so to hold would be directly in defiance of the decision of the House of Lords in the second *Archer-Shee* case (1), where it is said that apart from the power of revocation under the settlement he has no more, to quote Lord Tomlin's language, than a chose in action.

It is clear therefore, that the beneficial enjoyment of the income would be restored by the exercise of the power of revocation and that otherwise he would not have it. That seems to me to dispose of that argument.

In those circumstances what is the position ? It is provided in the section that any income which is covered by the section—and I have already stated that I think this income is so covered—" shall be deemed for the purposes of the enactments relating to income tax . . . . to be the income of the person who is or was able to obtain the beneficial enjoyment thereof." It is found in the Case that the income which we have here to consider is an income to which the respondent, Mr. Astor, became absolutely entitled from certain American stocks and shares; so that it was an income arising from stocks and shares, to quote the language of r. 1. Now if it is provided, as it is, by s. 20 that in the circumstances there contemplated, and which here have happened, the income shall be deemed for the purpose of income tax to be the income of the person, it seems to me to follow, that income being as found, arising from stocks and shares, that the operation of this section is to deem this income, although not at the moment arising from stocks and shares because he has not in fact revoked the settlement,

(1) [1931] A. C. 212, 222; 15 Tax Cas. 693, 735.

to be an income which does arise from stocks and shares. That seems to me the natural meaning of the words "to be deemed to be." That phrase is assuming that a situation, which the phrase "deemed to be" seeks to bring about, has not yet come to be. Were it the fact that this was an income in praesenti arising from stocks and shares it would not be necessary to provide that it should be deemed to be the income, but directly this power of revocation is in the deed as a power, it is so to be deemed to be, and being deemed to be, it is for the purpose of the income tax, within r. 1.

With every respect, I do not follow the learned judge when he quotes passages from *Colquhoun* v. *Brooks* (1) and other cases which bring him to the conclusion that this is a mere piece of machinery and not a charging section. In strictness it is neither. It is an interpretation of the meaning of the word "income." The charging section is contained in the schedule and in the rules. This is a dictionary to bring within r. 1 the word "income," and that is itself explained, its meaning and its operation; and in that case we simply have to consider that this is an income of the settlor. It is an income, therefore, as found by the case arising from stocks and shares.

There was one other argument which was used by Mr. Latter, to which I may be allowed to refer. As I understand it, Mr. Latter said this. Be it conceded that this power of revocation does make the income the income of the settlor, nevertheless, in so far as the revocation has in fact not been exercised, it is still in fact the income of the trustee, and therefore the section, though it would in one sense make it the income of the settlor, would not make it an income arising from stocks and shares until in fact the power of revocation had been exercised.

That argument seems to me an untenable one for the reasons which I have already given. I think that the deeming section operates to make it not only an income but an income of that quality which it in fact was before the settlement; and that is stated in terms in the case to be an income arising from stocks and shares. If it had never been an income

(1) 14 App. Cas. 493.

arising from stocks, shares or rents different considerations might arise, but I think the section brings it in terms within r. 1 by the notional assumption that it is such an income and therefore being an income deemed to be an income arising from stocks and shares in a place out of the United Kingdom, the tax must be computed on the full amount thereof.

I have dealt with this matter at some length because we are differing not only from the learned judge in the present case, but we are, as I see it, overruling the first part of his decision in *Marchioness of Ormonde* v. *Brown.* (1) It is because we are doing that and therefore disturbing a view which has prevailed and by which the Commissioners have felt themselves bound since last year, that I thought it right to give my reasons at some length.

ROMER L.J. Under and by virtue of the settlement of September 13, 1929, the income arising from the American stocks and shares referred to in the Case is payable to and received by the trustee who is resident outside the United Kingdom. The settlement, however, reserves to the respondent, who is the tenant for life under it, a power of revocation by which he can, without the consent of any other person, cause the income to be paid directly to himself and for his own benefit. It is in these circumstances contended on the part of the Crown that in consequence of the provisions of s. 20, sub-s. 1 (*a*) of the Finance Act, 1922, such income is to be deemed for the purposes of the Income Tax Acts to be the income of the respondent and not the income of the trustee. To this contention there would not appear, at first sight at any rate, to be any answer. It seems to be exactly what the sub-section enacts. The respondent, however, seeks to escape from the sub-section on two grounds. He says in the first place that the words " any income " with which the sub-section begins mean any income in respect of which income tax is already payable. With all respect to Finlay J. who, following his earlier decision in the *Marchioness of Ormonde's* case (1), accepted this contention, I am unable to agree with it. The sub-section

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(1) 17 Tax Cas. 333.

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refers in terms to "any income," and I can see no justification for qualifying those words in any way. The contention seems to be based upon the existence of some presumption that the word "income" when used in reference to the Income Tax Acts means income that is subjected to tax by those Acts. The question of the meaning of the word "income" depends no doubt upon the context in which it is to be found and in some contexts the meaning may have to be limited in the way suggested, but I know of no presumption in the matter. Each case must depend upon its own context.

Now in the present case it is to be observed that the sub-section does not purport to be imposing any additional tax upon incomes or indeed to be dealing in any way with the charging or collection of income tax. The sub-section does not, as Finlay J. seemed to think would be the case if he accepted the Crown's contention, bring into charge the income from foreign possessions of a foreigner.

In the present case, for instance, the American trustee will be no more liable to be taxed in respect of the income received by him than he would have been had the sub-section never been enacted. The sub-section does not alter or affect any single provision of the Income Tax Acts. All that the sub-section does is to enact that in certain circumstances and for the purposes of those Acts the income of one person shall be notionally increased and the income of another shall be notionally diminished. I can see no reason in this for placing any restriction on the natural meaning of the word "income." Whether this notional additional income will or will not be subjected to income tax will depend upon the Income Tax Acts. If the income from foreign stocks and shares accruing to a person residing in the United Kingdom is by virtue of the sub-section to be deemed to be the income of a person who is not so resident, it will cease to be chargeable. This is admitted by the respondent. He contends, however, that the sub-section cannot operate so as to render a person resident in this country chargeable in respect of the income from foreign stocks and shares of which the beneficial enjoyment is vested in a person not so resident. I can see no justification for putting a

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construction upon the sub-section that would produce so anomalous a result. If in the first case the income of the resident in this country is to be notionally diminished under the sub-section, I cannot find from the context any valid reason why in the second case it should not be notionally increased.

The respondent, however, contends in the next place that the sub-section does not apply to a case where the owner of the power of revocation already has the beneficial enjoyment of the income in question. This is of course quite true. If the income be already his there would be no sense in enacting that it is to be deemed to be his. If the respondent is in the beneficial enjoyment of the income from the stocks and shares he is already chargeable in respect of it. In point of fact, however, he is not chargeable in respect of that income apart from the sub-section because, and only because, he is not in the beneficial enjoyment of it. For the settlement is one that has to be construed and that takes effect according to the law of the State of New York, and according to that law, the whole legal and equitable interest in the income is vested in the trustee. The income of which the respondent is in beneficial enjoyment is derived not from the stocks and shares within the meaning of r. 1 of the Rules applicable to Case V. of Sch. D to the Income Tax Act, 1918, but from the trustee, and is therefore income arising from possessions out of the United Kingdom other than stocks, shares or rents within the meaning of r. 2. See *Archer-Shee* v. *Garland*. (1) It is, of course, true that this income would have no existence were it not for the fact that the trustee is the legal and equitable owner of the income from the stocks and shares; and if by the operation of the sub-section this last mentioned income is to be deemed for the purpose of our income tax law to be that of the respondent and not that of the trustee, it necessarily follows that the income at present being received by the respondent from the trustee must be deemed to have no existence. The two incomes are, however, essentially different from the point of view of the Income Tax Acts. The respondent can therefore by virtue of his power of revocation place himself in the beneficial enjoyment of an income that must be regarded as being essentially different from the income of which he has the beneficial enjoyment under the settlement. For the purpose of the Acts his income must accordingly be deemed to be increased by the addition of the one and diminished by the subtraction of the other.

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(1) [1931] A. C. 212; 15 Tax Cas. 693.

For these reasons I agree that this appeal should be allowed, and the *Marchioness of Ormonde's* case (1), so far as it is in conflict with this decision, should be overruled.

*Appeal allowed.*

Solicitors: *Solicitor of Inland Revenue; Janson, Cobb, Pearson & Co.*

W. I. C.

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## THE KING *v.* MINISTER OF TRANSPORT.

## *Ex parte* UPMINSTER SERVICES, LIMITED.

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*Oct.* 19;
*Nov.* 8.

*Road Transport—Motor-coaches—Road Service Licence—Grant by Commissioner—Appeal to Minister against granting of Licence—Order for future contingent revocation—Jurisdiction—Ultra vires—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 74, 81.

The Road Traffic Act, 1930, s. 81, provides: "(1.) Any person who— . . . . (*b*) being . . . . a person providing transport facilities who has opposed the grant of a road service licence, is aggrieved by the grant thereof or by any condition or by any variation of the conditions attached thereto . . . may within the prescribed time and in the prescribed manner appeal to the Minister. (2.) On any such appeal, the Minister shall have power to make such order as he thinks fit (including an order revoking a licence), and any such order shall be binding upon the commissioners. . . . .":—

*Held*, by the Court of Appeal (reversing the decision of the Divisional Court), that, notwithstanding the wide power conferred by s. 81, sub-s. 2, the Minister was only entitled to make an order for the revocation of a licence when the making of such an order was appropriate to the subject-matter of the appeal before him.

When therefore opponents to the grant of a road service licence and backing authorizing the running of a service of motor-coaches along a particular route appealed to the Minister against the grant on the ground that the service was not needed in the interest of the public, the Minister had no jurisdiction to make orders on the appeals which in effect were orders for the revocation of the licence and backing as soon as adequate provision had been made for road services on the particular route. The only subject-matter of the appeals before him was whether the licence and backing had been properly granted, and there was no jurisdiction to make orders for a future contingent revocation.

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(1) 17 Tax Cas. 333.

APPEAL from a judgment of the Divisional Court (Lord Hewart C.J., Avory and Humphreys JJ.) discharging a rule nisi for a writ of certiorari directing the removal into Court to be quashed of two orders of the Minister of Transport.

Upminster Services, Ld., was a company incorporated on June 15, 1932, and formed to carry on the business of motor-coach proprietors and to operate a service of motor-coaches from Aldgate to Upminster via Ilford and Becontree, and the company took an assignment of the rights, goodwill, and assets of all parties who were operating or had operated a service along this route—namely, Eastward Coaches, Ld., and Edward Henry Hillman and Hillman Saloon Coaches.

On June 15, 1932, the company applied under s. 72 of the Road Traffic Act, 1930, to the Metropolitan Traffic Commissioner for a road service licence to continue to operate a service along this route and to the Traffic Commissioners for the Eastern Area for a backing of the licence. Both applications were opposed by Green Line Coaches, Ld., and the London Midland and Scottish Railway Company. On July 29, 1932, the Metropolitan Traffic Commissioner granted the road service licence subject to conditions, which included a condition that passengers were not to be taken up in the Metropolitan area except at specified points and a condition preventing the company charging a fare of less than 1*s.* for any stage any part of which lay in the Metropolitan Traffic Area, and on September 2, 1932, the Traffic Commissioners for the Eastern Area granted a backing of this licence subject to conditions, which included a condition precluding them from picking up passengers in the Eastern Traffic Area and setting them down in that area and a condition preventing them from charging a single fare of less than 1*s*.

On August 24, 1932, the company appealed to the Minister of Transport under s. 81 of the Act against the above conditions, and on August 25, 1932, Green Line Coaches, Ld., and the London Midland and Scottish Railway Company each appealed against the granting of the licence and backing on the ground that there was no public need for the service.

By the direction of the Minister an inquiry by way of appeal was held by Colonel Tolerton, an official of the Ministry, on November 28, 29, and December 6, 1932. On January 23, 1933, the Minister made two orders. By the first, which is made on the appeals of the Green Line Coaches, Ld., and the railway company against the granting of the licence, the Minister ordered that " the Commissioner shall revoke the said licence so soon as he is satisfied, after consultation with the Traffic Commissioners for the Eastern Area, that adequate provision has been made for road services between Upminster and London " ; and by the second, which was made on their appeals against the granting of the backing, the Minister made a like order directed to the Traffic Commissioners for the Eastern Area.

On January 24, 1933, an official of the Minister wrote to the Clerk to the Traffic Commissioner, Metropolitan Area, and to the Clerk to the Traffic Commissioners, Eastern Area, forwarding the orders, and the letter contained the following passage : " after due consideration of the facts and careful consideration of the representations made by the parties, the Minister has decided not to make an order on the Traffic Commissioners except in the case of the appeal number (d) (above) "—those of Green Line Coaches, Ld., and the railway company—" In that case the Minister is satisfied that the Upminster Services, Ld., have been operating the service illegally and improperly from its inception and for this reason, amongst others, he has come to the conclusion that the licence and backing granted to them should be revoked as soon as the Commissioners are satisfied that adequate provision has been made for road services between Upminster and London. He has made orders accordingly. . . . ."

In these circumstances the company obtained on February 13, 1933, a rule nisi for a writ of certiorari upon the grounds (inter alia) that

"1. The Minister and/or his representative failed to exercise his discretion judicially and failed in his public duty in that he took irrelevant and extraneous matter into consideration, viz. : evidence of the alleged illegalities of the predecessors of Upminster Services, Ld., prior to the formation of the Company and/or their operation of the route under the licence and backing thereof and was thereby influenced to revoke the said licence and backing.

2. As there was no evidence and/or no proper evidence of illegalities of Upminster Services, Ld., before the Minister and/or his representative subsequent to the grant of the licence ordered to be revoked and/or the inception of the services operated by the said company on or about August 14, 1932, the Minister has failed to exercise his powers judicially and has failed in his public duty in making the said order.

3. The Minister and/or his representative failed in his public duty in that he took into consideration matters extraneous to s. 72, sub-s. 3 (*a*, *b*, *c*, and *d*), and was thereby influenced to revoke the aforesaid licence and backing and in doing so acted ultra vires and contrary to law."

By the affidavit dated May 2, 1933, of Colonel Tolerton made in opposition to the rule he said that at the inquiry he had admitted evidence given previously on the application of Eastward Coaches, Ld., and of Hillman Saloon Coaches in 1931 for the granting of a road service licence and backing, and further said that at the appeal inquiry held by him counsel for Upminster Services, Ld., stated that the company had at first operated or attempted to operate the service in accordance with the conditions attached to the licence, but had been compelled by circumstances to cease doing so in October, 1932, and in particular had charged fares less than the minimum fare of 1*s.* and had issued season tickets.

The Divisional Court discharged the rule nisi, holding that there was no ground for saying that the Minister or his representative had taken irrelevant or extraneous matter into consideration and that the Minister had acted within the wide powers conferred on him by s. 81 of the Act.

The company appealed. The appeal was heard on October 19, and judgment given on November 8, 1933.

*Stuart Bevan K.C.*, *Comyns Carr K.C.*, *P. B. Showan* and *C. N. Shawcross* for the appellants. Sect. 61 of the Road Traffic Act, 1930, defines public service vehicles and s. 67 provides for public service vehicle licences. Then s. 72 gives the Commissioners power to grant road service licences and s. 74 gives the Commissioners who granted a licence power to revoke or suspend it on the ground that any condition subject to which the licence was granted had not been complied with. It is s. 81, sub-s. 1, which gives a right of appeal to the Minister by (amongst others) (*a*) any one aggrieved by the refusal to grant him a licence or with any condition imposed by the Commissioners; (*b*) a local authority or a person providing transport facilities who has opposed the grant of the licence and is aggrieved by the grant or any condition attached to it; and (*c*) the holder of a licence aggrieved by its revocation or suspension; and sub-s. 2 provides that " on any such appeal, the Minister shall have power to make such order as he thinks fit (including an order revoking a licence), and any such order shall be binding upon the commissioners or certifying officer." That sub-section cannot mean that the Minister is free to make any order he pleases on an appeal before him. The order must be relevant to the subject-matter. Here the appeals against the granting and backing of the licence were brought under (*b*) on the ground that the service licensed was unnecessary. If the appeal had succeeded, the only proper order would have been for the revocation of the licence; but the order made shows that the service was necessary until some other provision for road service was made, and the appeals ought therefore to have been dismissed. Instead the Minister made orders for the future revocation of the licence and backing, and the letter of January 24, 1933, shows that they were made on the ground that the service had been operated improperly. The jurisdiction to revoke on that ground is vested in the Commissioners under s. 74, and there is no right of appeal from their decision. The Minister's order is therefore ultra vires, and this appeal ought therefore to be allowed and a rule absolute granted. Again, the evidence of Colonel Tolerton in opposition to the granting of the rule nisi shows that irrelevant and extraneous matters were taken into account —namely, the criticisms made against the predecessors of the company in regard to their method of operating service, and on this ground also the appeal should be allowed. Further, there was no evidence in the opponents' appeals on which these orders were made of any irregularity of the company, and the Minister had no right to take into account a statement by counsel for the company on the company's appeal that latterly the company had failed to comply with the condition as to minimum fares. It is to be noticed, too, that the orders in fact directed the Commissioners to revoke the licence and backing on the happening of a contingency, and there is no jurisdiction to do this.

[*Sir Thomas Inskip A.-G.* That point is not open to the appellants, for it is not a ground on which the rule nisi was obtained. The order is there treated as an order for revocation made by the Minister.]

[LORD HANWORTH M.R. We have come to the conclusion that this point is not open to the appellants.]

In any case the licence was revoked on a ground never taken on the appeal and never brought to the company's attention to enable them to argue the question. The Minister therefore failed to act judicially, and on this ground also the appeal should be allowed : see *Board of Education* v. *Rice* (1) ; *Local Government Board* v. *Arlidge* (2) ; and *Li Hong Mi* v. *Attorney-General for Hong Kong*. (3)

*Sir Thomas Inskip A.-G.* and *W. Bowstead* for the Minister. It is admitted that the Minister must act judicially, but on the other hand it is not necessary to prove over again in this particular appeal any fact within the knowledge of the Minister. The task of the Minister is to keep roads clear of unnecessary traffic, and for this purpose he can have regard to the position as made known to him in other appeals. The Road Traffic Act, 1930, is unique in the wide range of facts that the Commissioners and the Minister have to take into account, and they cannot all be proved on each appeal. Further, a point has been made about the letter of January 24, 1933, but it is the orders and not the letter that the Court is being asked to quash. It has been said that the only order made is on the appeals by the objectors to the grant of the licence and backing, but the company's appeal against the conditions attached to the licence and backing must in effect have been dismissed in view of the orders for revocation of the licence and backing. In these proceedings it has been assumed that the Minister's order is in effect an order for revocation at a later date. The Minister had power to make this order under s. 81, sub-s. 2, of the Act. It is to be remembered that under s. 74 the Commissioners are given power to revoke a licence on the ground that any condition has not been complied with, and there is no right of appeal from a refusal by them to order the revocation. The only appeal is from an order granting a licence. Therefore, when in s. 81, sub-s. 2, the Minister is given power to revoke a licence it is not in connection with any matter dealt with in s. 74, but on an appeal from the grant of a licence or the attachment of conditions to a licence : see s. 81, sub-s. 1. On any such appeal the Minister may, on hearing the evidence, reading the Commissioner's report, and applying his experience as to the volume of traffic on the particular route, simply make an order for revocation of the licence. Not only is this so, but the Minister may, under s. 81, sub-s. 2, make " such order as he thinks fit (including an order revoking a licence) " and therefore he is free to attach conditions to the licence or, as here, to order its revocation at a later date. The governing consideration is the convenience of the public. The Minister must of course act honestly, but if he does so he can make any order he thinks fit. The order made in this case was therefore within the very wide powers of the Minister. The Minister is not confined to ascertaining whether the Commissioner

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(1) [1911] A. C. 179, 182.
(2) [1915] A. C. 120, 130.
(3) [1920] A. C. 735.

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has made a proper order, but can deal with the whole matter.

It is contended that it is not necessary to justify the grounds of the Minister's decision, as stated in the letter of January 24, 1933. It is sufficient to say that the Minister has acted honestly and bona fide and within his very wide powers.

[They were stopped.]

*Stuart Bevan K.C.* in reply. To justify the Minister's order in this case it is necessary to go even farther and say that he is entitled to make the order without calling for an explanation from the appellant as to the matters influencing him in making the order. It is against the principles of natural justice that he should be able to do so. Further there is no ground for giving to s. 81, sub-s. 2, such a very wide interpretation. It is not necessary to assume that the sub-section gives the Minister power to revoke irrespective of the nature of the appeal before him. There is power under s. 81, sub-s. 1 (*b*), to appeal against the grant of a road service licence, and on such an appeal an order for revocation might be justified. That would have been so in this case if the Minister had found, as the opponents contended, that there was no need for the particular service.

[ROMER L.J. Is that really a revocation? The order granting the licence is set aside.]

Yes, but the licence is an actual document, and unless something were done to revoke it, it would stand and could be produced to the police. It may be that "cancelling" would have been a better word than "revoking" in s. 81, sub-s. 2, but it is contended that this is what is meant; and the words "including an order revoking a licence" ought to receive this limited construction rather than to allow the Minister to revoke a licence on grounds in regard to which the licensee has not been heard. It is to be observed that s. 81, sub-s. 2, applies to an appeal under s. 81, sub-s. 1 (*d*), by the holder of a public service licence. That is a licence to use a motor vehicle "as a stage carriage an express carriage or a contract carriage" provided for in s. 67, sub-s. 1, and it relates solely to the fitness of the vehicle; and if s. 81, sub-s. 2, were given the wide power suggested, the Minister could, on an appeal against the refusal of a certifying officer to remove the suspension of such a vehicle, revoke a road service licence. Such a result can never have been intended, and any other possible construction is to be preferred. The Minister has to exercise an appellate jurisdiction, with the result that the order for revocation of a licence can only be made in an appropriate case.

*Cur. adv. vult.*

1933. Nov. 8. LORD HANWORTH M.R. I have had the opportunity of reading the judgment which Lord Russell of Killowen has written, and he has expressed so completely my own opinion upon the case that it would be of no service for me to write an independent one, and I will only add a few words upon one or two points.

The appellate jurisdiction which is given to the Minister by s. 81 of the Road Traffic Act, 1930, is set in motion by certain specified persons or authorities, within certain limits, and to obtain certain results. Thus an applicant who is aggrieved by the refusal of the grant of a licence, or with the conditions imposed upon any such grant, may under sub-s. 1 (*a*) appeal to the Minister; and any holder of a public service vehicle licence, or a road service licence, who is aggrieved at the revocation or suspension of it, may under sub-s. 1 (*c*) appeal to the Minister.

The Minister must act judicially upon the hearing of such an appeal. That is plain from the very nature of the jurisdiction conferred. It is confirmed by the terms of the Regulations made by the Minister under s. 94 for the purpose of enabling him to carry out his duties and to decide what his order shall be. In doing this he must, as Lord Loreburn L.C. said in *Board of Education* v. *Rice* (1), " act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything."

Now in the present case, the Minister has treated the licence as good, and it is by his order to remain good until upon a future contingency the opportunity for and possibility of

(1) [1911] A. C. 179, 182.

revoking the licence shall arise, and the revocation is to be exercised by the Commissioners after consultation with the Traffic Commissioner for the Metropolitan area.

The decision of the Minister came as a surprise to the applicants. They had not been called upon to discuss and repel an order of revocation, yet the order was made under a power which, it is claimed, is held by the Minister under sub-s. 2 in vacuo. I agree that some limitation is to be placed upon the apparently wide words in sub-s. 2: "including an order revoking a licence." They must be read as conferring that power when it would be appropriate to exercise it. The words cannot apply to sub-clauses (*a*), (*c*), or (*e*) of sub-s. 1, and therefore must be read subject to an implied limitation such as: "where it is appropriate that it should be exercised." The revocation cannot be superadded to any order of any sort made by the Minister if he is minded to make such an addition. For the reasons therefor stated by Lord Russell and herein, I agree that the appeal must be allowed with costs here and below and the Rule made absolute.

LORD RUSSELL OF KILLOWEN. The question for decision on this appeal is whether two orders, each dated January 23, 1933, and purporting to have been made by the Minister of Transport under the Road Traffic Act, 1930, were orders which he had power to make under the Act; or whether the orders, if intra vires, were, in the circumstances of this case, improperly made by reason of a failure by the Minister to exercise his powers judicially.

The relevant facts must be stated. The appellant company, Upminster Services, Ld., was incorporated on June 15, 1932, with the object of entering into and carrying into effect an agreement referred to in the memorandum of association. This was an agreement (eventually dated July 7, 1932) by which a company called Fairway Coaches, Ld., and a Mr. Hillman (both claiming as rival purchasers from a company called Eastward Coaches, Ld.) sold to the appellant company the right title or interest of the Fairway Company and Mr. Hillman in the goodwill of Eastward Coaches, Ld., including therein the preferential right to apply for road traffic licences; and also the right title and interest of Mr. Hillman in the goodwill created by his having run a service of motor-coaches on the route hereinafter mentioned; and all such rights, if any, to apply for road traffic licences as Mr. Hillman might have thereby acquired. The route in question was from Aldgate to Upminster via Ilford, along which Eastward Coaches, Ld., had, under licences from the then proper authorities, been running a service of motor-omnibuses or coaches. There is no evidence to show when this sale to the appellant company was completed, but the company commenced to operate the route under the road service licence hereinafter mentioned on August 14, 1932.

Immediately on its incorporation, the appellant company applied under s. 72 of the Act to the Metropolitan Traffic Commissioner for a road service licence; and to the Traffic Commissioners for the Eastern Area for a backing of the licence. This two-fold procedure was necessitated by the fact of the route running from one jurisdictional area into another. At the hearing of these two applications Green Line Coaches, Ld., and the London Midland and Scottish Railway Company appeared as objectors. The licence and backing were both granted, but certain conditions were attached thereto, including a condition as to minimum fares and a condition as to stopping places. The licence is dated July 29, 1932, and the backing is dated September 2, 1932.

The appellant company appealed against the conditions specifically referred to above. Green Line Coaches, Ld., and the railway company appealed against the grant of the licence and backing, the grounds of their appeals being such as to indicate that the licence and backing should not have been granted by the Commissioners at all. Under the Act these appeals are appeals to the Minister, who directed that an inquiry should be held by an official of the Ministry who was to report to the Minister. In the result the Minister made no order on the appellant company's appeals except as to costs; but upon the appeals of Green Line Coaches, Ld., and the railway company he made the two orders which are the subject of the present proceedings. The first one is The Road Service Licences (Appeals) Order (No. 6), 1933; and it is in the following terms: "Whereas the London Midland and Scottish Railway Company and Green Line Coaches, Ld., have appealed to the Minister of Transport (hereinafter referred to as 'the Minister') under the provisions of s. 81 of the Road Traffic Act, 1930, against the decision of the Traffic Commissioner for the Metropolitan Traffic Area (hereinafter referred to as 'the Commissioner') to grant a road service licence to Upminster Services, Ld., of Stratford, London, in respect of an application to provide a service of stage carriages between Aldgate and Upminster via Ilford (which application has been designated in the publication of Notices and Proceedings issued by the Commissioner as application T.N.R. 1215/1). And whereas the Minister has caused an Inquiry to be held into the subject-matter of the said appeals. Now therefore the Minister in exercise of the powers vested in him under or by virtue of the Road Traffic Act, 1930, and of all other powers in that behalf vested in him, hereby orders as follows: '(1.) The Commissioner shall revoke the said licence so soon as he is satisfied, after consultation with the Traffic Commissioners for the Eastern Area, that adequate provision has been made for road service between Upminster and London. (2.) This Order may be cited as 'The Road Service Licences (Appeals) Order (No. 6) 1933.'"

The second order relates to the Eastern Area, and the appeals against the grant of the backing, and is in the same terms mutatis mutandis. The operative part runs thus: "Now therefore the Minister in exercise of the powers vested in him under or by virtue of the Road Traffic Act, 1930, and of all other powers in that behalf vested in him hereby orders as follows: '(1.) The Commissioners shall revoke the said backing so soon as they are satisfied, after consultation with the Traffic Commissioner for the Metropolitan Area, that adequate provision has been made for the road services between Upminster and London. (2.) This Order may be cited as 'The Road Service Licences (Appeals) Order (No. 7) 1933.'"

It is essential at this point to consider the purport and effect of these two orders of the Minister in relation to what the orders call "the subject-matter of the said appeals." The subject-matter of the appeals referred to in those orders was (in the one) the question whether the Metropolitan Traffic Commissioner ought on July 29, 1932, to have granted a road service licence to the appellant company, and (in the other) whether the Eastern Area Commissioners ought, on September 2, 1932, to have granted a backing to that licence. No other question was submitted by those appeals for the determination of the Minister under his appellate jurisdiction.

The question submitted for his determination by the appellant company's appeals was whether the licence and backing should be subject to the particular conditions. Those appeals must be taken to have failed. But what about the appeals upon which the Minister made his orders ? It appears to me that they must be taken to have failed also, because the orders treat the licence and backing as having been properly granted, and as remaining in full force and effect until the happening of a future and uncertain event—namely, the authority for each area being satisfied (after consultation with the authority for the other area) that adequate provision had been made for road services between Upminster and London. That event might conceivably never happen ; but, at any rate, until it did happen the appellant company's licence and backing are recognized as a licence, and backing properly granted under the Act. The orders, however, provide that if and when the specified event happens, the licence and backing are to be revoked by the respective Commissioners.

As will be seen from the provisions of the Act there is no power in the Minister to make any such order—namely, an order ordering Commissioners to revoke. The power of the Commissioners to revoke is a power given by s. 74, and is to be exercised by them on application made to them, and in accordance with their discretion, after hearing the parties and considering the matter ; and it is difficult to understand how the Minister can have considered himself entitled to dictate to the Commissioners how they were to exercise this discretionary power which is vested in them by way of original jurisdiction. The parties, however, seem to have treated these orders as though they provided for revocation by the Minister, and I think that the matter must be dealt with here on that footing—namely, as if the Minister himself had ordered that upon the happening of the event specified, the licence and backing were to be revoked. But even upon this footing the orders remain orders which recognize the propriety of the grants of the licence and backing, but which purport to revoke them upon the happening of a future contingent event. The orders, in so far as they affirm the propriety of the grants, would seem to be an undoubted exercise of an appellate jurisdiction; but in so far as they purport to revoke a validly granted licence and backing they would appear to be an attempted exercise of original jurisdiction.

I now proceed to consider whether the Minister had any power to revoke the licence and backing, and for this purpose attention must be drawn to the relevant provisions of the Act.

Sect. 72 deals with the grant by the Commissioners of road service licences, that is licences to provide such a road service as may be specified in the licence. Sub-s. 3 provides that the Commissioners " in exercising their discretion to grant or to refuse a road service licence in respect of any routes and their discretion to attach conditions to any such licence " shall have regard to a number of specified matters, including the extent to which the proposed service is necessary or desirable in the public interest. Sect. 73 provides for the backing by the Commissioners of one traffic area of a road service licence granted by the Commissioners of a different traffic area. The power of revoking and suspending road service licences is given to the Commissioners by s. 74, sub-s. 1, which runs thus: " A road service licence may be revoked or suspended by the commissioners who granted the licence on the ground that any condition subject to which the licence was granted has not been complied with: Provided that the commissioners shall not revoke such a licence unless, owing to the frequency of the breach of conditions on the part of

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the licensee, or to the breach having been committed wilfully, or to the danger to the public involved in the breach, the commissioners are satisfied that the licence should be revoked or suspended." The only other provisions which appear to be relevant are the first two sub-sections of s. 81, which deal with appeals to the Minister. They are in the following terms: "(1.) Any person who—(*a*) being an applicant for the grant of a public service vehicle licence or road service licence, is aggrieved by the refusal or failure of the commissioners to grant the licence, or with any condition imposed by the commissioners; or (*b*) being a local authority which, or a person providing transport facilities who, has opposed the grant of a road service licence, is aggrieved by the grant thereof or by any condition or by any variation of the conditions attached thereto; or (*c*) being the holder of a public service vehicle licence or road service licence, is aggrieved at the revocation or suspension thereof, by the commissioners or by any variation of the conditions attached thereto; or (*d*) being the holder of a public service vehicle licence, is aggrieved by the refusal of a certifying officer to remove the suspension thereof; or (*e*) being an applicant for or the holder of a certificate of fitness, is aggrieved by the refusal of a certifying officer to issue such a certificate or by the limitation of its duration proposed by the certifying officer or by the revocation of a certificate; may within the prescribed time and in the prescribed manner appeal to the Minister. (2.) On any such appeal, the Minister shall have power to make such order as he thinks fit (including an order revoking a licence), and any such order shall be binding upon the commissioners or certifying officer."

It is sought to justify the Minister's orders here under the wide words of sub-s. 2, which it is said entitle the Minister upon the occasion of any appeal under the section to make any order which he thinks fit to make in regard to the licence, and in particular an order revoking the licence even though the question of the revocation of the licence is not raised directly or indirectly by the appeal which is brought to him under the section.

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I cannot so read the sub-section. The words though wide in form must necessarily receive some limitation from the context in which they occur. "Such order as he thinks fit" must necessarily be limited to orders in reference to the subject-matter of the appeal; similarly the words "including an order revoking a licence" cannot apply to all appeals under the section. They cannot for instance apply to appeals under (*a*) from a refusal by the Commissioners to grant a licence, or to appeals under (*c*) against the revocation of a licence, or to appeals under (*e*) as to certificates of fitness. The wide words accordingly must be cut down to some extent.

But it is said (and truly) that there is no right of appeal from a refusal by the Commissioners to revoke a licence; it is therefore argued that the words must apply to some or one of the appeals specified in s. 81, sub-s. 1. I agree that that is so; they certainly apply to an appeal against the grant of a licence. But it is further contended that they apply to all appeals in cases where a licence granted by the Commissioners is in fact in existence, and enable the Minister, if he so wishes, to revoke the licence even though the propriety of the grant of the licence is not the subject-matter of the appeal. With that contention I disagree. I cannot accept this interpretation of a section the object of which is to confer an appellate jurisdiction. Any order may be made under the section, the making of which is involved in or necessitated by the Minister's decision upon the question which is submitted to his review on appeal; thus if his decision upon that question involves the view that the licence should never have been granted, he could in the exercise of his appellate jurisdiction order the revocation of the licence. The express reference to revocation was probably inserted to make it clear that, notwithstanding s. 74, the Minister could revoke in the exercise of his appellate jurisdiction under s. 81. But he may not in my opinion under s. 81 exercise original jurisdiction (which is given to the Commissioners under s. 74) by revoking a licence which was originally rightly granted.

This is what he has done in the present case; for by his orders the licence is treated as and remains good until a future contingent event, upon the happening of which he (according to the way in which the parties have construed and treated the orders) revokes the licence.

This in my opinion is not a revocation within the power given by s. 81, but is an attempt by the Minister to usurp the original jurisdiction which by s. 74 is conferred not upon him but upon the Commissioners. The orders are in my opinion beyond the competence of the Minister to make.

So far I have dealt with the matter solely upon a consideration of the terms of the orders, and without reference to the letter of January 24, 1933. If this letter may be properly referred to, it makes the position all the clearer; for it is evident from its contents that the causes of the attempted revocation are or include illegal and improper operation of the service by the appellant company; in other words that the reason or one of the reasons for the revocation is the alleged fact that conditions subject to which the licence was granted have not been complied with, that is, the very ground which founds the jurisdiction of the Commissioners under s. 74.

A further point was urged on behalf of the appellant company—namely, that even assuming that s. 81 conferred power upon the Minister to make the orders here in question, they were nevertheless bad because he had not acted judicially in that the appellant company had not been in any way heard upon the alleged grounds of revocation. I do not think it necessary to say anything upon this contention, except to point out that while this unjudicial procedure may very easily take place if the Minister's construction of s. 81 is correct, it could not occur if his power to revoke is restricted to cases where his decision upon the point under appeal necessarily involves the view that a licence should never have been granted. It follows from what I have said that in my opinion the order nisi should have been made absolute.

It was said however that the grounds set forth in the order nisi were insufficient to justify the contention that the orders were beyond the powers of the Minister under s. 81. I do not agree. I think that the point is covered by the allegation that in revoking the licence and backing, the Minister acted

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ultra vires and contrary to law. From the brief judgments of the Divisional Court it does not appear that the essential distinction between original and appellate jurisdiction has been considered. Indeed Humphreys J. seems to treat the matter to a great extent as though the appellant company had been applying to the Minister for the grant of a licence. The matter was disposed of in the Divisional Court upon the footing, as it seems to me, that under the wide words of s. 81 the Minister had a power to revoke a licence which had properly been granted by the Commissioners. This for the reasons which I have indicated he had no power to do.

In my opinion the appeal succeeds. The order discharging the order nisi should be discharged, and in lieu thereof it should be ordered that the order nisi be made absolute and a writ of certiorari be directed to issue to the Minister accordingly. The Minister must pay the appellant company's costs here and below.

Romer L.J. The first question to be determined on this appeal, and one that goes to the root of the whole matter, is whether the Minister of Transport was acting within his powers in revoking the road service licence granted to the appellant company on July 29, 1932. As a matter of fact the Minister did not himself revoke the licence. He merely ordered the Traffic Commissioner for the Metropolitan Traffic Area to revoke it on the happening of a certain event. This distinction, however, was not one of the grounds upon which the appellants obtained the rule nisi, and the matter was therefore argued before us on the footing that the Minister by his order of January 23, 1933, himself had revoked the licence conditionally upon the happening of the event. Whether or not he had power so to do depends upon the proper construction of s. 81 of the Road Traffic Act, 1930. By sub-s. 2 of that section the Minister is given power on any such appeal as is referred to in sub-s. 1 to make such order as he thinks fit, and such an appeal was no doubt before him when he made the order in question. But the appeal was that of the Green Line Coaches, Ld., and the London Midland and Scottish

Railway Company, and was brought against the decision of the Commissioner to grant the road service licence. The appeal was based on the ground (in effect) that there was no further need for the service referred to in the licence, which was a service between Upminster and London. The appellants urged, in other words, that there was already adequate provision for such a service. This allegation they failed to establish ; for the Minister by his order makes it quite plain that at that time no such adequate provision had in fact been made. The appeal, therefore, was unsuccessful, and the decision of the Commissioner to grant the licence, which was the decision appealed from, should, one would think, have been affirmed. The Minister, nevertheless, conditionally revoked the licence, and seeks to justify his action on the ground that s. 81, sub-s. 2, of the Act enabled him to make any order that he thought fit. I am not prepared to take this view of the sub-section. Plainly some limit must be placed upon the generality of the words used. No one can suppose that the Legislature intended to create a dictatorship in the person of the Minister of Transport, if and whenever an appeal happened to be brought before him under the section. It is equally incredible that the sub-section should have been intended to give the Minister power to make any order he might think fit relating to road transport in general, or even road transport in the area affected by the matter brought before him on the appeal. The sub-section, after all, is not one dealing with the powers of the Minister of Transport as such. It is dealing with his powers as an appeal tribunal exercising quasi judicial functions, and the orders that he may make as such. The most natural, and, in my opinion, the proper meaning of the sub-section is that the Minister may give such decision on the questions raised by any particular appeal as he may think right, and give such directions as may be necessary for giving effect to that decision. But his decision must be confined, as in the case of other judicial or quasi judicial tribunals, to the questions brought before him on the appeal, and he must not travel outside them. This seems to be in accordance with the view taken by Lord Parmoor as to the meaning of somewhat similar

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words in s. 47, sub-s. 6, of the Valuation (Metropolis) Act, 1869. That sub-section, in dealing with objections to a provisional list brought before the Assessment Committee, enacts that the Committee "may make such order as they think fit." In the case of the *Royal Agricultural Hall Co.* v. *Islington Assessment Committee* (1) Lord Parmoor, dealing with these words, said (2): "the powers of the assessment committee under the sub-section are limited to the determination of the particular objection." So, too, in the present case the powers of the Minister of Transport are limited to the determination of the particular questions raised on the appeal before him.

It is urged, however, on the part of the Minister, that such a limitation of the powers given him by the sub-section is ruled out by reason of the words "including an order revoking a licence." For no appeal to the Minister appears to lie from the refusal of a Commissioner to revoke a licence, and therefore the words in question, so it is argued, show that his powers are not limited to dealing with the particular questions brought before him on appeal. It is said that once an appeal comes before the Minister he may revoke a licence, though nobody has asked him to do so by the notice of appeal or otherwise. This, if true, may lead to strange results. If an applicant for a road service licence, for instance, feels aggrieved by the imposition of a particular condition, and appeals to the Minister to have it removed, he may find his licence revoked altogether, or he might find his public service vehicle licences, or even his own driving licence, revoked. For the words "a licence" would, on this argument, seem to include any licence, or, at any rate, any licence granted under the Act. Nor can I see why an applicant appealing against the granting of a road service licence to a rival line should not find his own licence or licences revoked. I am not prepared to adopt a construction that gives rise to results so extravagant if the words are capable of a more reasonable meaning. And, in my opinion, they are. For it must often happen, as indeed it happened in the present case, that a licence will have already been actually granted before the appeal is heard. In such a case, should the Minister on an appeal against such grant decide in favour of the appellant, it would be necessary, in order to give effect to that decision, that the licence should be revoked. In my opinion this is the reason for the insertion of the words in question. They do not give the Minister power to travel outside the particular question brought before him on the appeal. They merely empower him to revoke a licence when such revocation is necessary for the purpose of giving effect to his decision upon that question.

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(1) [1918] A. C. 525.

(2) Ibid. 539.

For these reasons (as well as for the reasons given by my Lords, whose judgments I have had the opportunity of reading) I am of opinion that this appeal should be allowed.

Solicitors: *Daybells*; *Treasury Solicitor.*

H. C. G.

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*Oct.* 12, 13.

*Ecclesiastical law—Tithe rentcharge—Recovery—Distress, extent of—Notice of intention to distrain—Necessity—Tithe Act*, 1836 (6 *&* 7 *Will.* 4, *c.* 71), *s.* 81—*Tithe Act*, 1891 (54 *&* 55 *Vict. c.* 8), *s.* 2—*Tithe Rentcharge Recovery Rules*, 1891, *rr.* 2, 4.

The right given by the Tithe Act, 1836, s. 81, to a person entitled to tithe rentcharge to distrain for arrears thereof upon the land liable thereto extends to all the goods and chattels upon the land, which are not specially protected from distress by law, and is not limited to things which were titheable before the passing of the Act.

*Newnham* v. *Bever* (1849) 8 C. B. 560; *Ex parte Arnison* (1868) L. R. 3 Ex. 56; and *Bailey* v. *Badham* (1885) 30 Ch. D. 84 considered and explained.

Where an officer is appointed by the county court under the Tithe Act, 1891, s. 2, to distrain upon land occupied by the owner thereof for arrears of tithe rentcharge issuing thereout, it is essential to the validity of the distress that ten days' notice thereof should be given to the occupier of the land under the Tithe Act, 1836, s. 81.

*New College, Oxford* (*Warden and Scholars*) v. *Davison* (1933) 49 Times L. R. 579 followed.

Appeal from Salisbury County Court.

On October 1, 1931, certain tithe rentcharge became due from Mr. E. J. Thorne, farmer, the owner and occupier of

Church Farm, Coombe Bissett, in the county of Wilts. On April 18, 1932, an application was made to the county court on behalf of Queen Anne's Bounty for payment of alleged arrears of the rentcharge. On April 20, 1932, notice of the application was served on the occupier by registered post. On May 5, 1932, the application was heard and an order was made for the issue of a distress warrant for 13*l.* 6*s.* 1*d.* On February 24, 1933, no previous notice of intention to distrain having been given to the occupier, a bailiff purporting to act under a warrant and the order entered the farmhouse and there seized certain goods and effects which were described in the notice next hereinafter mentioned as being an upright piano, an American roll-top writing desk, a mahogany dining table, a five feet oak sideboard with plate-glass backs, doors and cupboards, an upholstered settee and two armchairs in tapestry, and three stained dining chairs with loose upholstered seats in tapestry; and on the same date notice of the seizure was given to the occupier.

On March 2, 1933, the registrar of the county court made an application to the judge for leave to sell by tender the above-mentioned goods; and the hearing was adjourned to enable counsel on both sides to prepare their arguments on the questions raised.

On April 6, 1933, the judge, after hearing the arguments of counsel on both sides, made an order granting leave to sell the goods by tender.

Notice of appeal dated April 11, 1933, was given by the occupier that the order of the county court judge should be set aside on the grounds (1.) that the judge was wrong in law in having held that upon the true construction of the Tithe Act, 1891, s. 2 (1), and of the Tithe Act, 1836, s. 81 (1), the said goods could lawfully be distrained upon for arrears of tithe rentcharge, and (2.) that the judge was wrong in law in having held that it was not necessary for Queen Anne's Bounty before distraining for tithe rentcharge to give ten days' notice as required by the Act of 1836, s. 81. (1)

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(1) The Tithe Act, 1836, s. 81, provides: "In case the said rentcharge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rentcharge, and to dispose of the distress when taken, and otherwise to act and demean himself

*A. T. Miller K.C.* and *Ashton Roskill* for the appellant. The distress was invalid by reason of the fact that the respondents did not give the appellant ten days' notice of their intention to distrain. By the Tithe Act, 1891, s. 2, sub-s. 2 (1), where lands liable to tithe rentcharge are occupied by their owner an order of the county court for recovery of arrears of the rentcharge shall be executed by the appointment by the court of an officer, who shall have the like powers of distraint as are conferred by the Tithe Acts on the owner of the tithe rentcharge, and no greater or other powers. These powers are contained in the Tithe Act, 1836, s. 81 (2), under which the person entitled to the tithe rentcharge only acquires a right to distrain after having given ten days' notice in writing of the distress. It is essential to the validity of a distress by the officer under the later Act that that notice be given: *New College, Oxford* (*Warden and Scholars*) v. *Davison.* (3) In Leach on The Tithe Acts (6th ed. 1896), it is stated that notice of the distress must be given.

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(1) See note (1) ante, p. 298.

in relation thereto as any landlord may for arrears of rent reserved on a common law lease for years; . . . ."

The Tithe Act, 1891, s. 2, provides: "(1.) Where any sum due on account of tithe rentcharge issuing out of any lands is in arrear for not less than three months, the person entitled to such sum may, whatever is the amount, apply to the county court of the district in which the lands or any part thereof are situate, and the county court, after such service on the owner of the lands as may be prescribed, and after hearing such owner if he appears and desires to be heard, may order that the said sum, or such part thereof as appears to the court to be due, be, together with the costs, recovered in manner provided by this Act, and tithe rentcharge as defined by this Act shall not be recovered in any other manner.

"(2.) Where it is shown to the court that the lands are occupied by the owner thereof, the order shall be executed by the appointment by the court of an officer who, subject to the direction of the court, shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge and no greater or other powers; and if there is no sufficient distress the person entitled to the sum ordered to be recovered may proceed to obtain possession of the lands under s. eighty-two of the Tithe Act, 1836." The Tithe Rentcharge Recovery Rules, 1891, made under the Act of 1891, provide: r. 2. A person claiming to be entitled to a sum due on account of tithe rentcharge, who desires to obtain an order of court for the recovery thereof, in these rules called the applicant, shall file with the registrar of the court a notice of application according to the form in the appendix which is applicable to the case, and as many duplicates or copies thereof as there may be parties to be served therewith. r. 4. The registrar of the court shall appoint a day for the hearing of the application and shall cause to be served on the owner of the lands out of which the tithe rentcharge issues, and, where an occupier's liability notice has been filed [under r. 3], on that occupier, one of the notices of application, together with a notice according to the form in the appendix. The service shall be made at least ten clear days before the day appointed for the hearing of the application . . . . The Appendix to the Rules sets out the Forms to be used. Form 1, which is that of "Notice of application where the owner of the lands is also the occupier" gives notice that he applies for an order for the recovery of the sum due, and that he will apply "that the order for recovery be executed by the appointment of an officer to distrain under sub-s. 2 of s. 2 of the Act."

In any case the distress was invalid because the officer had no right to seize the goods of the appellant which he did in fact seize. Distress in its origin was the taking of a pledge to compel a person to do something—Bullen on Distress (2nd ed.), pp. 1, 3. The earliest example was that of the taking of cattle damage feasant, which could be exercised on the offending beast only—Bullen on Distress (2nd ed.), p. 4. Another example is seen in the taking of heriots. Ibid. p. 60. Tithes were a proportion of the produce of land, called prædial when arising immediately from the ground, such as crops; mixed when arising from things immediately nourished by the ground such as calves, milk, eggs; and personal when arising from the profits of labour: Halsbury's Laws of England, vol. xi., p. 742, art. 1461 (2nd ed., p. 878, art. 1585). Tithe rentcharge is tithe which for convenience has been reduced to a money payment, but the alteration has not changed the nature of tithes—per Bacon V.-C. in *Bailey* v. *Badham.* (4) Originally a defaulter in payment of tithe was brought before an ecclesiastical court and fined, and it is probable that eventually

(1) See note (1) ante, pp. 298, 299.

(2) See note (1) ante, p. 298.

(3) 49 Times L. R. 579.

(4) 30 Ch. D. 84, 88.

he was excommunicated, or, if brought before a civil court, imprisoned. Sect. 81 of the Tithe Act, 1836, gives a right to distrain for arrears of tithe rentcharge "upon the lands liable to the payment thereof," but it does not say "on the goods and chattels" of the defaulter. On the analogy of the taking of cattle damage feasant as a pledge, distress for tithe rentcharge is limited to titheable goods. The tithe payer is not personally liable: see s. 67 of the Act of 1836, and s. 2, sub-s. 9, of the Act of 1891; and there is therefore no reason in making his personal goods and chattels distrainable. Where the legislature intended this it said so in plain terms, as in the case of persons liable for small tithes—7 & 8 Will. 3, c. 6, s. 3, and in the case of Quakers—7 & 8 Will. 3, c. 34, s. 4, in which cases distress on "goods and chattels" was authorized. Under the Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 22, where rentcharge has been apportioned upon lands taken for the purpose of a railway, distraint is authorized on the goods, chattels and effects of the railway company. In such a case titheable goods would not be available; but the legislation was unnecessary if the respondents are right. Sect. 82 of the Act of 1836 provides that where "there shall be no sufficient distress on the premises liable" to the payment of tithe rentcharge, the person entitled may obtain a writ of possession of the lands. There the word "distress" is qualified by the word "liable" and the section shows that the legislature was contemplating some goods on the premises which were not liable to be taken for non-payment of tithe rentcharge.

*J. E. Singleton K.C.*, *W. H. Duckworth* and *A. H. Armstrong*, for Queen Anne's Bounty, respondents. As to the question whether it was necessary that the respondents should have given to the appellants ten days' notice of the distress, it is submitted that it was not. The Tithe Act, 1836, s. 81, no doubt provides that where tithe rentcharge was in arrear it should be lawful for the person entitled thereto, after having given ten days' notice to the tenant in possession, to distrain upon the lands liable to the tithe rentcharge. It was found, however, that when the person who was entitled to the tithe rentcharge himself made the distress rioting ensued in various parts of the country, and it was therefore thought desirable that that mode of enforcing payment should be otherwise exercised. The Tithe Act, 1891, accordingly introduced an entirely new mode of enforcing the payment of tithe rentcharge. On the true construction of the Acts of 1836 and 1891, so far as they relate to procedure for the recovery of tithe rentcharge, the earlier Act is entirely superseded and replaced by the later Act. Under the Act of 1891, s. 2, sub-ss. 1 and 2, and the Tithe Rentcharge Recovery Rules, 1891, made pursuant thereto, power is given to the county court to make an order that tithe rentcharge in arrear be recovered, and, where the land is occupied by its owner the order is to be executed by the appointment of an officer who shall have the like powers of distraint as had been conferred by the previous Acts upon the claimant himself; the person entitled to the tithe rentcharge may make an application to the court for an order to be so executed; a day is appointed for the hearing of the application; notice of the application for an order to be so executed is to be served upon the owner and occupier of the land at least ten clear days before the hearing; and on the hearing the court may make the order for recovery and appoint the officer to distrain. There is no provision in the Act of 1891 or in the Rules thereunder requiring that ten days' notice of the distress be given to the owner or occupier of the land. Sect. 2, sub-s. 2, of the Act of 1891 gives the officer "the like powers of distraint" as the tithe rentcharge owner had, but it does not impose upon him the like duty of giving ten days' notice of the distress. The condition precedent to the distress of ten days' notice thereof is gone, and the officer of the court has a right to make the distress although no previous notice of it has been given. Under the new system the owner of the land suffers no hardship through not receiving ten days' express notice of the distress because under that system he gets a notice of a different kind which is fully equivalent to ten days' notice of the distress. The Rules of 1891, by r. 4 provide for service on the owner of the land of a notice of the application ten days before the hearing, and the notice of application, according to the form in the Appendix to the Rules, includes an express intimation that the claimant will apply that the order for recovery be executed by the appointment of an officer to distrain. Instead of the old ten days' notice of distress, there is now a ten days' notice of an application to the court for the appointment of an officer to distrain.

As to the question whether the goods and chattels which were seized could lawfully be distrained upon for tithe rentcharge, the county court judge was right in holding that they could. It is somewhat surprising that hitherto no such question appears to have been dealt with by the courts. Before 1836 tithes were paid in kind, but the inconvenience of collecting tithe in kind, and the fluctuating nature of the income derived from it, made it desirable that it should be replaced by some more convenient form of property: Halsbury's Laws of England, vol. xi., p. 745 (2nd ed., p. 881). The Tithe Act, 1836, was accordingly passed for the purpose of effecting the required alteration in the law. By s. 67 of that Act titheable lands are absolutely discharged from the payment of tithes, and instead thereof, there became payable a rentcharge issuing out of the land. It is to be observed that the substituted payment is a rentcharge and therefore analogous to rent. By s. 81 the person entitled to the tithe rentcharge is given a right to distrain upon the lands for arrears, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent on a common law lease for years. The section does not expressly limit the right to distrain to any particular goods, and it cannot be construed as impliedly limiting the right to goods which were distrainable before the Act, because on that construction it would fail to remove most of the difficulties which it intended to remove. As the section gives a right to distrain, and as s. 12 defines "lands" as meaning messuages, lands, tenements and hereditaments, that right to distrain is of the widest description and extends to all goods and chattels on any of these kinds of hereditaments. Even if the Act had in terms done no more than give a person entitled to the tithe rentcharge a right to distrain, the right would have been of that wide character; because, subject to certain exceptions, the general rule of the common law is that any chattels on the premises, whether belonging to the tenant or to a stranger, may be taken under a distress, and the rule applies to a rentcharge as well as to rent under a lease: see Richardson's Law of Distress (1924), pp. 34, 132, 133. The reported cases, so far as they are applicable, go to show that the statutory right to distrain given to the person entitled to tithe rentcharge extends to all the chattels on the land charged: *Newnham* v. *Bever* (1), *Ex parte Arnison* (2), and *Bailey* v. *Badham.* (3) There is no foundation for the argument that, because s. 81 of the Act of 1836, unlike provisions in certain older Acts, does not expressly mention goods and chattels, it does not give a right to distrain for tithes upon all the goods and chattels on the land. The reason why these older Acts gave a right to distrain, not on the land, but on the goods and chattels of the person liable, is that their object was to give the titheowner power to distrain the goods and chattels wherever they might be, and so to follow them in case of their removal from the land. It was for this reason that the Acts 7 & 8 Will. 3, c. 6 (1696), s. 3; and 53 Geo. 3, c. 127 (1813) gave power to distrain the goods and chattels of persons liable for small tithes; and that the Acts 7 & 8 Will. 3, c. 34 (1696), s. 4; 5 & 6 Will. 4, c. 74 (1835), and the Tithe Act, 1836, s. 84 (repealed), provided that the goods of Quakers might be distrained. Similarly the Railway Regulation Act, 1844, s. 22, provides that where tithe rentcharge due from a railway company is in arrear, it shall be lawful for the person entitled to distrain upon the goods, chattels and effects of the company, whether on the land charged therewith or any other lands of the company. There are special reasons for that provision. The tithe rentcharge may be apportioned to a part of the railway line on which the trains do not stop. In that case, if the titheowner had been restricted to that part of the line his right to distrain would have been useless, because he could not seize the engine and carriages of a train in motion, nor the rails and sleepers of the line, and the land from its nature could yield no other distrainable effects. Hence the section empowers him to distrain upon the goods of the company whether on that land or any other lands of the company. The section, however, limits the right to distrain to the goods of the company, as otherwise the distrainer might seize the goods of other persons which happened to be upon the company's premises, such as passengers' luggage, or trucks belonging to another company or to a private person. The Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 121, sub-ss. 1, 2, which replaces the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44, sub-s. 1, provides that where a rentcharge is in arrear the person entitled may distrain on the land. That provision must mean that that person can distrain upon any goods on the land, and not merely upon titheable produce, since, otherwise, when agricultural land became a building estate the right of that person to distrain would be gone. A person entitled to tithe rentcharge comes within that provision, because, for this purpose, tithe rentcharge is the same as any other rentcharge: see Richardson's Law of Distress, p. 34.

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(1) 8 C. B. 560.

(2) L. R. 3 Ex. 56.

(3) 30 Ch. D. 84.

*Miller K.C.* in reply. The true interpretation of s. 81 of the Act of 1836 is that the right which it gives to the owner of tithe rentcharge to distrain upon the lands is limited to their titheable produce, and does not, like that of the landlord, extend to all the goods and chattels thereon. That interpretation of the section makes it coherent and consistent with the rest of the law relating to distress for tithes. The Act of 1891, s. 2, sub-s. 2, proceeds to say that, if there is no sufficient distress, the person entitled may obtain possession of the lands, and the Rules of 1891, r. 8, give the county court power to appoint a receiver of the profits of the land. These are remedies appropriate to the recovery of tithes, and the grant of them goes to show that distress under the Tithe Acts is restricted to titheable produce. The case of *Newnham*

v. *Bever* (1) decides in effect that s. 81 of the Act of 1836, in giving the owner of tithe rentcharge a right to distrain upon the lands, only gives him the same right as that of the landlord so far as the mode of conducting the distress is concerned, but not so far as the extent of the distress over all the goods and chattels upon the land is concerned. The judgment of Bacon V.-C. in *Bailey* v. *Badham* (2) makes it plain that the right of distress of the titheowner is confined to titheable produce only.

SWIFT J. This appeal from an order made by his Honour Judge Maxwell when he was sitting in the county court at Salisbury, giving leave for the sale by tender of certain goods which had been seized under a distress warrant, raises two questions of considerable importance.

Of these questions the one which has been dealt with first by learned counsel, and which I propose to deal with first, is that arising on the ground stated, secondly in the notice of appeal—namely, that the learned county court judge was wrong in law in holding that it was not necessary for Queen Anne's Bounty, the present respondents, or for the officer appointed to act for them, before distraining for arrears of tithe rentcharge to give or leave ten days' notice in writing at the usual or last known residence of the owner of the land, the present appellant, as required by the Tithe Act, 1836, s. 81. This point is one of considerable importance, and it was one which was considered by me very fully and to the best of my ability in a case of *New College, Oxford (Warden and Scholars)* v. *Davison.* (3) In that case I formed the opinion that, notwithstanding the provisions of the Tithe Act, 1891, it was still necessary, for the protection of the landowner who was liable to tithes, that, before a distress was levied upon him, or rather upon his goods and chattels, he should receive ten days' notice of the intention to levy the distress. I have nothing to add to what I said in that case, and my view is unaltered by the argument of

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(1) 8 C. B. 560.

(2) 30 Ch. D. 84.

(3) 49 Times L. R. 579.

Mr. Singleton. Before this case reaches the Court of Appeal that Court will in all probability have expressed their view as to whether I was right or wrong in the *New College, Oxford* (*Warden and Scholars*) v. *Davison.* (1) I have nothing to add to my view as there expressed. In my opinion ten days' notice is necessary before a distress can be levied.

The second point which is raised in this case is one of considerable interest, and, strangely enough, so far as I know, of absolute novelty. By s. 81 of the Tithe Act, 1836, very nearly 100 years ago, power was given to the owner of a tithe rentcharge to distrain upon the land of the person who was liable to pay the rentcharge so as to realise payment of that which was due to him and had not been paid. In that period of by far the greater part of a century, the question has never to my knowledge been raised directly what goods and chattels the owner of the tithe rentcharge is entitled to levy upon. I suppose that throughout the whole period of operation of the Tithe Acts there have been disputes going on between the owners of the tithe rentcharge and the persons who are liable to pay it. From time to time these disputes crop up vigorously, and the courts are occupied with them and public attention is called to them, but even in what I may call quiescent times these sorts of questions are constantly arising, and it strikes me as a most curious fact that so far as I know this question has never fallen to be dealt with or decided before. There are cases in which questions as to tithes have been discussed, and some of them have been cited in this case by one side or the other, but I do not think, when we come down to the bed-rock of the question which is before us to-day, that those cases help us very much. We have to decide, and apparently for the first time, a question arising under s. 81 of the Tithe Act, 1836—namely, what goods is an owner of tithe rentcharge entitled to seize when he distrains on the land coming within that section?

It was agreed that before 1836 the titheowner had no right to distrain at all. That is to say, he had no right corresponding to that of a landlord who at common law was

(1) 49 Times L. R. 579.

entitled to seize the tenant's goods for the purpose of paying rent which was in arrear. The titheowner had no such right of distraint. His rights were clearly confined to the property which rendered the estate or holding liable to pay tithes. In Halsbury's Laws of England, vol. xi., at p. 742 (1), it is said: "Tithes are the tenth part of all fruits, prædial, personal, and mixed, which are due to God and consequently to His Church's ministers for their maintenance. Tithe is in its inception an ecclesiastical inheritance collateral to the estate of the land, and of its proper nature due only to an ecclesiastical person by the ecclesiastical law. Tithes are payable yearly out of all things which with the aid of cultivation yield increase by the act of God, although the increase be not realized every year. Tithes which arise merely and immediately from the ground, as grain of all sorts, hay, wood, fruits, and herbs, are called prædial tithes. Tithes which arise from things immediately nourished by the ground, as colts, calves, lambs, chickens, milk, cheese, eggs, are called mixed tithes. Tithes which arise from the profits of labour and industry, being the tenth part of the clear gain after charges deducted, are called personal tithes." That passage describes what tithes were in their origin. Mr. Miller, in the course of his argument, told us that they went back as far as Leviticus, but he was unable to tell us the methods of enforcing payment in those days. We do not need to go back quite so far. It is sufficient, in my opinion, for the purposes of this case, to ascertain what the position was, let us say, in 1835, just before the passing of the Act of 1836. At that time the titheowner had no right to distrain in the sense that a landlord had a right to distrain. He could in certain circumstances obtain or take some tenth portion of the goods which were called "titheable." He was entitled to one-tenth of these goods, and great difficulties arose in ascertaining what he was entitled to, and constant disputes took place as to what property was titheable, what its value was, what one-tenth of it was, and how it was to be dealt with. The result of all that uncertainty was that in 1836, following upon other Acts which had realized and more or less dealt with the difficulties, the Act of Parliament which I have mentioned was passed for the commutation of tithes in England and Wales. Among the earlier Acts referred to was an Act of 1832, 2 & 3 Will. 4, c. 100, which was introduced by the statement that: "Whereas the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented, by shortening the time required for the valid establishment of claims of a modus decimandi, or exemption from or discharge of tithes: . . . .," showing clearly that the public were then fully aware of the inconvenience of collecting tithes.

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(1) 2nd ed. p. 878.

By the Act of 1836, instead of tithes being paid in kind by means of things arising on the land and the proceeds of the land, and the beasts of the field being liable to be taken in favour of the owner of the tithe, the rights and liabilities of the respective parties were commuted, and a money payment to be calculated as in the provisions of the Act laid down, was ordered to be made in the place of the payment of tithes in kind. The owner of the tenth portion of the produce of the fields in place of being able to receive his one-tenth portion in its ordinary shape, whether dead or alive, was to receive a sum of money. A right to distrain on the land for arrears of the sum was given to him by s. 81, and the whole question in this case is whether that section limits that right to distraining upon things which were titheable before 1836, or whether it gives a right to distrain upon any of the goods and chattels of the owner of the land which the titheowner is not prevented from touching by some express provision of the legislature. Before I read s. 81, I should like, and I think it right, to mention the definition of "distress" which is conveniently set out in Richardson on The Law of Distress at p. 1: "A distress is the taking of a personal chattel, without legal process, from the possession of a wrongdoer into the hands of the party; as a pledge, for the redress of an injury, the performance of a duty, or the satisfaction of a demand." It is to be noted that a distress is the taking of a personal chattel. It is not the taking of land, it is not the taking of an individual's body, it is the taking of a personal chattel. Therefore, to say that a person shall be at liberty to distrain on the land can mean, and in my judgment can only mean, that he is at liberty to go on to the land and take the personal chattels that he finds there. That was the right which was in existence in a landlord before 1836, and the right given to the titheowner was either, like that of the landlord unlimited and applicable to all the chattels on the premises, or limited, as Mr. Miller has contended in this case, to those chattels which were titheable before 1836. That being as I conceive it what a distress is, and what a liberty to distrain means, I pass on to consider s. 81 of the Act of 1836. The Act having formulated in the earlier sections a scheme for commuting the payment of tithe in kind into a payment in money, and having stated that that payment in money was to be in the nature of a rentcharge, s. 81 proceeded to say this. [His Lordship read the section and continued :] The section empowers the person entitled to the rentcharge " to distrain upon the lands liable." What for ? To find any chattels that may be the subject of a distress. He cannot seize the land : he cannot distrain upon the land itself. There are processes by which a party having a claim may get an order for possession of land, but nobody ever could speak of his distraining upon land except with the meaning that he may go upon the land and take any personal chattels he may find upon it to satisfy his claim. The section goes on : " and to dispose of the distress when taken." How is it possible to imagine that by these words it was meant that the titheowner may sell the land which he is given power to distrain on ? The power given to him to dispose of the distress must surely refer to the goods and chattels which he has seized in pursuance of the right which was given to him to distrain upon the land. That construction seems also to be borne out by the subsequent words : " and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years."

There has been a good deal of discussion founded on the case of *Newnham* v. *Bever* (1), which does not seem to me to be very helpful in considering the point that we have to decide. Whether s. 81 confers the position of a landlord on the owner of a rentcharge only after the goods and chattels have been seized, as that case seems to imply, or whether he is in the position of a landlord before he has made the seizure, does not seem to me to very much matter. But the case throws no light either way on what we have to decide here, namely, what personal chattels may be seized. I see nothing in this section to limit the personal chattels which are upon the premises to any particular class. There are Acts of Parliament which exclude from the danger of being seized under a distress, certain things such as workmen's tools, wearing apparel of a certain kind, bedding, and so on. We are very familiar with cases in which Acts of Parliament have added to or detracted from the ordinary common law rights of the landlord over his tenant, including his right of distress entitling him to enter upon the land and seize the goods and chattels which he finds there ; and other cases of that kind have been brought to our notice by the very valuable arguments which have been advanced to us by both sides with very great skill and with indications of very thorough research, not only by those who advanced them, but by those who argued the case in the county court and have since assisted them. When this Act of Parliament says that it alters the liability of the land to pay one-tenth of its increase and substitute for it an annual or bi-annual payment, which shall be regarded as being in the nature of a rentcharge, and that the person who has the ownership of the rentcharge shall have the power of distraining on the land, it seems to me obvious that it means that that person may distrain anything upon the land which is not expressly excluded by some Act of Parliament or provision which prevents him from touching some particular chattel or some part of the goods of the person distrained upon.

In those circumstances I think that the learned county court judge was right on this point when he said that there was nothing in the law of this country to prevent a person who has a right to levy a distress upon particular land from taking from that land any of the things which were seized in this case, namely, an upright piano, or an American roll-top writing desk, or a mahogany dining table, or a five feet oak sideboard, or an upholstered settee, and dining chairs. I think that those things were all liable to distress. The owner of the tithe, that is to say, the owner of the one-tenth of the produce of the land, was before 1836 entitled to go to the land and say, "I want my one-tenth of the produce." In 1836 Parliament said, "you will not go to the land and demand one-tenth of the produce, it only leads to disturbance throughout the country, we will commute the rights of yourself and the owner of the land, and your one-tenth shall in future be paid to you in cash, and if you cannot get your cash you shall be entitled to distrain upon the land." It did not say that he must not touch anything except that which might before have been attached. If it had said that it would not have removed all the difficulties which it intended to remove, and the old questions as to what was titheable and what was not would still have remained. Parliament intended to remove these difficulties and in my view it did remove them. There is no ground for saying that there is any limitation upon the right of the titheowner to distrain except the same limitations that are imposed upon a landlord who desires to distrain. I therefore think upon this second point, notwithstanding the contentions of Mr. Miller put so very forcefully and clearly, that the decision appealed against was right.

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(1) 8 C. B. 560 ; 19 L. J. (C. P.) 129.

du Parcq J. I shall deal first with the point which has already been the subject of a decision in another case. That point as taken in the notice of appeal is that the county court judge was wrong in law in holding that it was not necessary for the applicants before distraining for arrears of tithe rentcharge to give or leave ten days' notice in writing at the usual or last known residence of the respondent as required by the Tithe Act, 1836, s. 81. In order to consider that contention it is necessary to look at one section of the Act of 1891 and one section of the Act of 1836. [His Lordship read s. 2, sub-ss. 1 and 2, of the Act of 1891, except the last clause of the latter sub-section, and s. 81 of the Act of 1836, and continued :]

In this case the present respondents complied with s. 2 of the Act of 1891, by giving a notice to Mr. Thorne, the present appellant, of the proposed application to the county court for an order that the sum alleged to be due should be recovered in manner provided by that Act. That application was duly heard, and an order was made appointing an officer of the court who thereupon had in pursuance of s. 2, sub-s. 2, of that Act the like powers of distraint as were conferred by the Tithe Acts on the owner of tithe rentcharge and no greater or other powers. Taking these sections of the two Acts together, it appears to me to be at least reasonably plain that the power which he thereupon obtained was the power to distrain upon the lands after having given ten days' notice in writing of the distress. It is said by Mr. Singleton, on behalf of the respondents, that the true effect of the Act of 1891 is to do away with the necessity of that notice, and to substitute another notice. I am unable to see how the notice required under s. 2, sub-s. 1, which is a notice that an application is going to be made for an order which will bring about the appointment of an officer of the court with powers enabling him to distrain, can be said to be a notice that within a certain time a distress will in fact be levied. The first is a notice of the hearing of an application which may result in an order: the second is a notice that something, which the officer of the court who steps into the shoes of the owner of the tithe rentcharge has power to do, is about to be carried out—namely, a distress involving entry upon land which can only be rendered lawful by Act of Parliament. The tithe rentcharge owner had no power of levying distress except the power which was created by the Act of 1836; and the officer of the court gets no power except that conferred upon him by the Act of 1891, which is the same power as that which the previous statute

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QUEEN ANNE'S BOUNTY v. THORNE.

du Parcq J.

had conferred upon the tithe rentcharge owner. It does not seem to me possible to say that the Legislature intended that these sections should be read as meaning that the power that is conferred upon the officer of the court was a power to enter upon premises and distrain without giving any notice, and that the notice required by the Act of 1836 should be regarded as merely a condition precedent to the exercise of the right to distrain by the person entitled to the rentcharge. That seems to me to be a construction which it is impossible to place upon statutes giving a right of entry upon land and seizure of goods, which must be based upon clear words in the statute conferring it. It would have been perfectly easy for the legislature, if they intended that no notice of the distress should be required, to put in some such words as "without further notice," and make the matter clear beyond doubt. Instead of that, one finds on looking at the Act of 1891, that the legislature seems to have been at pains to show that the powers conferred upon the officer of the court were strictly limited, because he is to have the like powers "and no greater or other powers" than those of the titheowner, and it appears to me that when the titheowner's powers are considered, it clearly cannot be said that his right is to enter and distrain without qualification.

If one finds as a matter of construction that under s. 2, sub-s. 2, a further notice is required it is not necessary to find reasons why that further notice should be required. One can well understand, however, that the legislature may have thought that it would be unjust to allow distraint without further notice when one remembers that ample powers are given by the Rules of 1891 which have been made, and properly made under the statute, for what I may call a species of substituted service. For instance, by r. 13: "Where the applicant states in his notice of application that he does not know, or cannot ascertain, the owner of the lands, or where it is found that service on the person named in the application as owner of the lands cannot be effected by post as hereinafter provided, any proceedings under the Act may be taken against the owner of the lands without naming him, and notices and documents may be served accordingly." Parliament may well have thought that, as in these circumstances the notice given under s. 2, sub-s. 1, of the Act of 1891 might not in fact come to the knowledge of the owner, it was only a necessary and proper safeguard that a further notice should be given. It has been pointed out that in Leach on the Tithe Acts (6th ed.) the view is expressed that notice of distress is required, as has been contended by Mr. Miller. The statement in the text-book is not, of course, binding in any sense upon us, or authoritative, but it does tend, I think, to suggest that the practice as there stated had been accepted as the practice for a very long time, and it would seem that that practice has not been seriously challenged until recently. That consideration is I think of some importance when one is dealing with a matter of practice and procedure, because the Courts are reluctant to interfere with an inveterate practice. For all these reasons I have come to the conclusion that the decision of the learned county court judge was wrong on this point, and that that of my Lord is right.

I now turn to the other point, with which I think I can deal shortly because my Lord has dealt fully with it. I desire to associate myself with the words which have already fallen from him on that point, but I would like to add some observations of my own, if only to show that I have endeavoured to follow the arguments of counsel on each side. We start with the fact that before 1836 a titheowner was not in a position to distrain in the sense in which a landlord is entitled to distrain, and I will add nothing to what my Lord has said as to the position before 1836. Then comes this extremely important Act of 1836. As a matter of construction, in the light of what we know of the history of the matter, I read those words of s. 81, which confer a power of distraint upon the owner of the tithe rentcharge, in this way, that he is empowered to do three things and that each of these things is subject to the same defining clause. The things which he is empowered to do are these: first, "to distrain upon the lands liable to the payment thereof," that is of the tithe rentcharge; secondly, "to dispose of the distress when taken"; and thirdly, "otherwise to act and demean himself in relation thereto," and then defining and governing these powers, come the words—"as any landlord may for arrears of rent reserved on a common lease for years." I see no difficulty in reading the section in that way, especially if, to make the matter a little clearer, one puts in a comma after the words "in relation thereto." There are no commas in an Act of Parliament, and sometimes it becomes simpler to understand if one puts in one's own commas. It is interesting to notice that in this section of the Act of 1836 as set out in Chitty's Statutes there is no comma after "in relation thereto," while in s. 22 of the Railway Act, 1844, which is in very similar words, a comma has been inserted after the words "in relation thereto." I think that the true view of the section is that these final words, "as any landlord may for arrears of rent," refer just as much to the previous words "to distrain upon the lands liable to the payment thereof," and "to dispose of the distress when taken," as they do to the words "and otherwise to act and demean himself in relation thereto." I am therefore of opinion that when the bailiff entered upon the appellant's lands he had the right to take exactly what a landlord distraining for rent would have had the right to take.

Our attention has been called to a number of statutes beginning in 1695, which show that special provision had been made from that early date when it was a question of small tithes, and the people called Quakers were concerned, whereby the tithe rentcharge owner might be empowered to distrain upon goods and chattels. I agree with Mr. Singleton's contention that these statutes and the Railway Regulation Act, 1844, really do not help us in the consideration of this case. I need only say, without elaboration, that it seems to me plain that they merely show that the special power given to distrain was, in the case of Quakers on their goods and chattels wherever they might be found, and in the case of railway companies, upon goods of the companies which might be found anywhere upon their lands.

We were referred more particularly to three cases, and I only want to say a few words about each of these. The first is *Newnham* v. *Bever* (1) of which there is a report in the Common Bench series and also in the Law Journal. Neither report is quite full, and they do not entirely agree with one another. A case is an authority for what it decides, and it is necessary to consider what that case decided. An action of replevin was there brought against a tithe rentcharge owner who had distrained in the exercise of his power under s. 81 of the Act of 1836. That action failed and costs became payable by the plaintiff to the defendant, the owner of the tithe rentcharge. The defendant then said: It is true I am not a landlord, but I have all the powers of a landlord, and if an action of this kind had been brought against a landlord he would have had at one time double costs and now indemnity costs. The court decided that the defendant was not entitled to indemnity costs, and that though s. 81 of the Act of 1836 conferred upon the defendant the rights of a landlord the Act did not say that if an action was brought against him as the result of the distress he should have the advantage in relation to costs which a landlord had. That being what that case really decided, it seems to me that little assistance can be derived from it here.

Then we were referred to *Ex parte Arnison.* (2) That case I have found some difficulty about, but the court certainly dealt with the question whether under s. 81 of the Act of 1836, growing crops were distrainable. At common law a landlord could not distrain growing crops and by statute he could, and I think that there was some doubt in the mind of Channell B. whether a man put in the position of a landlord could rely on a statute which enlarged the common law rights of a landlord. He came to the conclusion that the words of s. 81, giving them an ordinary construction, authorized growing crops to be distrained. I do not find in that conclusion any support for Mr. Miller's argument. The judgments delivered in that case do not contain such language as I should have expected to

(1) 8 C. B. 560.

(2) L. R. 3 Ex. 56.

be used if the position had been that for which Mr. Miller contends.

I ought to say a few words about the case decided by Bacon V.-C., *Bailey* v. *Badham*. (1) It has been pointed out that towards the end of his judgment the learned Vice-Chancellor said: "I come to the conclusion that in the Tithes Commutation Act all that is given to titheowners is that they shall take out of the produce of the land the proportion mentioned in the Act. They have a right to compel the payment of that by distress and entry for two years, and they have no power, or right, to exercise the power of distress and entry except for two years." (2) In my view the Vice-Chancellor has stated there accurately the law relating to the right to tithe rentcharge, which is based on principles going back to the right of the Church to receive one-tenth of the produce of the land. The persons entitled to it have a right to compel payment of that amount by distress. That is the view of the law which this Court is now taking. The owner of the tithe rentcharge may compel payment by distraining, as a landlord may distrain, upon the goods and chattels of the person out of whose land tithe rentcharge is payable. For these reasons I agree with my Lord that on this second point the learned county court judge was right.

SWIFT J. The order of the county court judge is set aside, and the appeal allowed, with costs here and below. Leave is given to appeal on each point.

*Appeal allowed.*

Solicitors for the appellant: *Edward F. Iwi, for A. B. Lemon, Salisbury.*

Solicitors for the respondents: *Hamilton, Fulton, Sant & Jones, Salisbury.*

J. R.

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(1) 30 Ch. D. 84.

(2) Ibid. 91.

## TIDY *v.* BATTMAN.

C. A.
1933
*Oct.* 10.

*Negligence—Unlighted Lorry at Night on Highway—Collision with Motor Cycle—Contributory Negligence—Jury, Question for.*

The defendant's motor lorry was drawn across the road running from Chichester to Arundel at 7.45 P.M. on February 23, 1932, in such a position as to be an unlighted obstruction. A motor car had stopped behind the lorry about ten yards away on the near side, when the plaintiffs' son, who had been following the car on his motor cycle, drew out from behind, dashed into the lorry, and was killed. The plaintiffs brought an action in the county court under Lord Campbell's Act for compensation for loss as a result of the negligence of the defendant or his servant. The defence was that the accident was caused by the contributory negligence of the deceased. The county court judge left the case to the jury, who found that the defendant was negligent, and that the deceased could not by the exercise of ordinary care have avoided the consequences of that negligence. On appeal by the defendant:—

*Held*, by the Court of Appeal, affirming the Divisional Court, that, on the above facts, the questions of negligence and contributory negligence were rightly left to the jury.

Per Lord Wright and Slesser L.J.: The decisions in *Tart* v. *G. W. Chitty & Co.* [1933] 2 K. B. 453 and *Baker* v. *E. Longhurst & Sons, Ld.* [1933] 2 K. B. 461 are only applicable to the particular facts there present, and lay down no general principle of law.

APPEAL from Divisional Court.

The plaintiffs, John Tidy and Lucy Jane Tidy (husband and wife), brought this action against the defendant, under Lord Campbell's Act, to recover compensation for the loss of their son, who was killed, as they alleged, owing to the negligent driving of a motor lorry by the defendant or his servant between Chichester and Arundel on the night of February 23, 1932. The negligence alleged was that the lorry was drawn across the road and that no lights were visible, it being after lighting-up time and dark. The defence was that the accident was due to the contributory negligence of the deceased man.

The facts of the case were as follows:—

At 7.45 P.M. on the night of the accident, the defendant's motor lorry was drawn across the road between Chichester

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and Arundel in such a way as to obstruct the passage of about two-thirds of the road, and to persons coming along the road it was an unlighted obstruction. A motor car which was approaching the motor lorry had drawn into the near side of the road and stopped about 10 yards distant from the lorry. The plaintiffs' son was riding a motor cycle and was following behind the motor car. According to the evidence of the driver of the motor car, he himself did in fact give a signal to the traffic behind that he was about to pull up. The rider of the cycle, however, who was travelling at about 35 miles per hour, drew out from behind and, travelling straight on, crashed into the lorry and was killed.

At the trial in the county court, counsel for the defendant submitted that upon this evidence the court should direct the jury that the deceased was guilty of contributory negligence which had brought about the accident, and that the plaintiffs were not entitled to recover. He cited *Tart* v. *G. W. Chitty & Co.* (1) and *Baker* v. *E. Longhurst & Sons, Ld.* (2) The county court judge held that the question of contributory negligence must be left to the jury. The jury, finding in favour of the plaintiffs, gave a verdict for 150*l.*, and judgment was entered accordingly. From this judgment the defendant appealed.

The Divisional Court (Talbot and Macnaghten JJ.) dismissed the appeal.

Talbot J. said that he came to this conclusion with difficulty, having regard to the cases which had been cited, particularly *Baker* v. *E. Longhurst & Sons, Ld.* (2), which it was not easy to distinguish from the present case. But he was not prepared to dissent from the judgment of Macnaghten J.

Macnaghten J. held that, upon the facts, the county court judge was right in not withdrawing the case from the jury. He said, in the course of his judgment: "At night time the visibility of an unlighted obstruction to a person driving a lighted vehicle along the road must necessarily depend on a variety of facts, such as the colour of the obstruction, the background against which it stands, and the light coming

(1) [1933] 2 K. B. 453.

(2) [1933] 2 K. B. 461.

from other sources. It is common observation that lights placed in the footway beside a road cast shadows which cause considerable difficulty in seeing objects in the road, and indeed for that reason on many roads, where there is considerable traffic, the light is suspended from the centre of the road so as to obviate, as far as possible, the difficulty in which even the most careful driver is placed, by shadows cast by lights at the side.

It cannot, I think, be said that where there is an unlighted obstruction in the roadway, a careful driver of a motor vehicle is bound to see it in time to avoid it, and must therefore be guilty of negligence if he runs into it. The circumstances may be such that a prudent and careful driver proceeding at a proper pace and exercising the care which everybody ought to exercise, may be unable to observe it in time to stop before he reaches it. Here there is no evidence as to the colour of the lorry or as to the back-ground against which it was standing, but it is significant that, in the short space of time during which it was stationary, two motor cycles should have run into it."

The defendant appealed to the Court of Appeal. The appeal was heard on October 10, 1933.

*Scott Henderson* for the appellant. According to the rule laid down in *Tart* v. *G. W. Chitty & Co.* (1) and *Baker* v. *E. Longhurst & Sons, Ld.* (2), the county court judge ought to have held that in law the deceased, on the facts, was guilty of contributory negligence, which disentitled the plaintiffs to recover. The case should never have been left to the jury. The accident happened either because the deceased was not keeping a proper look out, or because he was going too quickly and could not stop. In either event, his negligence was the decisive cause of the accident. Here there were no exceptional circumstances in the plaintiffs' favour. The deceased man put himself in the dilemma referred to in the above cases.

[SLESSER L.J. I have always regarded cases of road collisions due to negligence as questions of fact.]

(1) [1933] 2 K. B. 453. (2) [1933] 2 K. B. 461.

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The cases cited lay down a clear rule of law as to the right to recover in precisely similar circumstances and this operates in favour of the defendant. [He referred also to *Evans* v. *Downer & Co., Ld.* (1).]

*Manningham-Buller* for the respondent was not called upon.

Lord Hewart C.J. In my view this appeal should be dismissed. I agree with the judgment of Macnaghten J. in the Divisional Court and with the decision of that Court affirming the county court judge.

Lord Wright. This is a pure question of fact. The cases of *Tart* v. *G. W. Chitty & Co.* (2) and *Baker* v. *E. Longhurst & Sons, Ld.* (3) show that no one case is exactly like another, and no principle of law can in my opinion be extracted from those cases. It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts. I agree with the judgment of Macnaghten J., and I observe that Talbot J. would have come to the same conclusion without reluctance, if he had not felt that he must pay respect to observations in other cases.

Slesser L.J. The principles laid down in the older authorities, such as *Butterfield* v. *Forrester* (4), *Tuff* v. *Warman* (5), and *H. & C. Grayson, Ld.* v. *Ellerman Line, Ld.* (6), are not affected by recent observations in the Court of Appeal or any other tribunal. I agree with my Lords that each of these cases depends on its own facts, and that one must apply to those facts the principles laid down in the authorities dealing with the matter. In the present case there was ample evidence upon which the jury could find, firstly, that the defendant had been negligent; and, secondly,

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(1) [1933] 2 K. B. 465, footnote.
(2) [1933] 2 K. B. 453.
(3) [1933] 2 K. B. 461.
(4) (1809) 11 East, 60.
(5) (1857–8) 2 C. B. (N. S.) 740; 5 C. B. (N. S.) 573.
(6) [1920] A. C. 466.

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that the deceased man could not by the exercise of ordinary care have avoided the consequences of that negligence.

*Appeal dismissed.*

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth, for G. H. King & Franckeiss, Portsmouth.*

Solicitors for respondent: *Rising & Ravenscroft, for Triggs Turner & Co., Guildford.*

F. P. F.

## JONES *v.* THOMAS.

1933
Nov. 1, 2, 13.

*Bastardy—Evidence—Corroboration—False statement by alleged father before hearing—Bastardy Laws Amendment Act,* 1872 (35 & 36 *Vict. c.* 65), *s.* 4.

A false statement made by the alleged father before the hearing of the complaint in affiliation proceedings is not necessarily corroboration of the woman's evidence in any material particular as required by s. 4 of the Bastardy Laws Amendment Act, 1872.

*Mash* v. *Darley* [1914] 3 K. B. 1226 and *Dawson* v. *McKenzie* (1908) 45 S. L. R. 473 explained and distinguished.

*Thomas* v. *Jones* [1921] 1 K. B. 22 considered.

Case stated by justices of the county of Merioneth.

A complaint was preferred by the respondent, Margaret Anthony Thomas, a single woman, aged twenty-five, against the appellant, Robert Price Jones, alleging that he was the father of a bastard child of which she was delivered on December 29, 1932.

At the hearing the respondent gave evidence that the appellant had had connection with her, once only, on March 31, 1932. She also said that the next time she and the appellant met was on May 20, 1932, when she told the appellant that she was afraid something was the matter with her, and in reply to the appellant's question whether she was certain, she replied that she was not, but that she was going to see a doctor. On July 22, 1932, after seeing a doctor, the respondent saw the appellant and inquired of him why he was keeping away, when the appellant said he was "not going to have anything to do with the matter."

The respondent's father gave evidence that on August 30, 1932, he went to see the appellant concerning the respondent's condition, and that the appellant on being asked whether he understood the visit, said that he did so, as a result of what one William Richard Jones had told him on the previous Sunday. The appellant denied everything, and on being told that the respondent's father proposed to see the appellant's father, the appellant said that he had not spoken to the respondent for a whole year.

The appellant gave evidence that he was twenty-nine years of age and lived with his parents. He admitted having spoken to the respondent on May 20, 1932, and about July 20, 1932, but he denied that she had said on either occasion that she was in trouble. He admitted that the respondent's father came to see him on August 30, 1932, and that he then told the respondent's father that he was not the father of the child, but denied that he had told him that he had not seen the respondent for a year.

The justices came to the conclusion that the version of the facts given by the respondent was the correct one, and they found that her evidence was corroborated in material particulars to their satisfaction in the following respects—namely :—

1. According to the respondent's evidence (which the justices accepted) the respondent had two interviews with the appellant with respect to her condition—the first on May 20, 1932 (within two months of the date of conception), and the next on or about July 22, 1932 (after the respondent had seen the doctor). The fact that such interviews took place was proved to their satisfaction by the evidence called both by the respondent and the appellant.

2. The justices were greatly impressed by the evidence (which they accepted) of the respondent's father, to whom the appellant denied that he had spoken to the respondent for a whole year (which in their judgment was untrue), and to whom he made a conditional promise to come down to meet the respondent, which promise he did not keep.

3. But what impressed the justices more than anything

was the untruthful suggestions made on the appellant's instructions to the respondent, and what they regarded as the untruthful evidence given on his behalf in support of those suggestions. In their judgment the appellant and certain witnesses had agreed to give false evidence concerning the respondent in order to defeat the respondent's application, and the justices could not but view his denial of the respondent's evidence in the light of that fact, and regard his whole conduct in the matter as strong corroboration of the respondent's evidence.

4. The appellant in cross-examination said he had asked the respondent's father to name the respondent's witnesses although, according to him, the appellant, he knew there were no witnesses.

The justices accordingly adjudged the appellant to be the father of the respondent's child.

*J. W. Morris* and *G. A. Thesiger* for the appellant. The facts relied on by the justices do not afford any evidence of corroboration in a material particular of the evidence of the respondent as required by s. 4 of the Bastardy Laws Amendment Act, 1872. It may well be that the conduct of the alleged father may amount to corroborative evidence where it appears that there is reason to infer from such conduct that the mother's story is true. But the evidence here does not bring the case within *Mash* v. *Darley*. (1) There was no corroboration of the complainant's evidence in a material particular to satisfy the statute: see *Burbury* v. *Jackson* (2) and *Gibbons* v. *Gibbons*. (3) Neither the appellant's statement to the respondent's father on August 30, 1932, that he had not spoken to the respondent for a whole year nor his conduct before and at the hearing affords any corroboration in a material particular of the evidence of the respondent.

[*Thomas* v. *Jones* (4); *Dawson* v. *McKenzie* (5); *McWhirter* v. *Lynch* (6); and *Rex* v. *Whitehead* (7) were also referred to.]

(1) [1914] 3 K. B. 1226.
(2) [1917] 1 K. B. 16.
(3) (1932) 96 J. P. 247.
(4) [1921] 1 K. B. 22.
(5) (1908) 45 S. L. R. 473.
(6) (1908) 46 S. L. R. 83.
(7) [1929] 1 K. B. 99, 102.

*R. M. Montgomery K.C.* and *J. J. Roberts* for the respondent. The decision of the justices was right. An untruth told by the alleged father before the hearing of the complaint is corroborative of the evidence of the mother in a material particular within the requirement of s. 4 of the Bastardy Laws Amendment Act, 1872. In *Mash* v. *Darley* (1) it was held that evidence of the conduct of the alleged father in giving evidence before the justices that the complainant was a fast girl and in not giving evidence to that effect at the assizes was corroboration of the complainant's evidence in a material particular as required by the statute.

Buckley L.J. said in that case that corroborative evidence might be found either in admissions by the man or inferences properly drawn from the conduct of the man. (2) In the Scottish case of *Dawson* v. *McKenzie* (3) Lord Dunedin and Lord McLaren suggest that untrue statements may be sufficient corroborative evidence to satisfy the statute. Lord Dunedin put it on the ground that while mere opportunity alone did not amount to corroboration, a false statement by the alleged father would give to a proved opportunity a different complexion from what it would have borne had no such false statement been made. Lord McLaren pointed out that the denial of circumstances which were otherwise proved would put a different complexion on what the Court might otherwise be disposed to regard as innocent.

*Cur. adv. vult.*

1933. Nov. 13. The following considered judgments were read :—

LORD HEWART C.J. This is an appeal by special case from a decision of the justices of the peace for the county of Merioneth, whereby they adjudged the appellant to be the father of an illegitimate child of the respondent. The child was born on December 29, 1932, and the respondent alleged that the appellant had had connection with her, once only, on March 31, 1932. The question we have to determine is whether the evidence of the respondent was corroborated in

(1) [1914] 3 K. B. 1226. (2) [1914] 3 K. B. 1226, 1231.
(3) 45 S. L. R. 473, 474, 475.

a material particular as required by s. 4 of the Bastardy Laws Amendment Act, 1872. The father of the respondent stated that on August 30, 1932, he went to see the appellant concerning the respondent's condition, and that the appellant upon being asked whether he understood the visit said that he did so, as a result of what one William Richard Jones had told him the previous Sunday. The appellant denied everything, and upon being told that the respondent's father proposed to see the appellant's father, the appellant said that he had not spoken to the respondent for a whole year. In fact the appellant had seen and spoken to the respondent on May 20, 1932, and on July 22, 1932, and the justices treated the untrue statement of the appellant to the respondent's father that he had not spoken to her for a whole year as corroboration of her evidence. There was no other corroboration in any material particular. It is true that the case states that the justices were impressed by untruthful suggestions made on the appellant's instructions to the respondent, and what they regarded as the untruthful evidence given on his behalf in support of these suggestions. But there was no evidence that the suggestions and evidence in question were untrue except the denials of the respondent.

The conduct of the alleged father may amount to corroborative evidence where it appears that there is reason to infer from such conduct that the mother's story is presumably true, as in *Mash* v. *Darley* (1) and *Thomas* v. *Jones* (2), and in the Scottish case of *Dawson* v. *McKenzie*. (3) There are dicta by Lord Dunedin and Lord McLaren which suggest that the fact of the alleged father having made statements which have been proved to be untrue may be sufficient corroborative evidence to satisfy the statute. But as I read those dicta it is only when the untrue statements are of such a nature, and made in such circumstances, as to lead to an inference in support of the evidence of the mother that they can be regarded as corroborative evidence, and not that the

(1) [1914] 3 K. B. 1226, 1231.
(2) [1921] 1 K. B. 22.
(3) 45 S. L. R. 473, 474, 475.

1933

JONES v. THOMAS.

Lord Hewart C.J.

mere fact of the alleged father having knowingly made false statements is in itself corroboration within the statute.

I do not think that the conduct of the appellant, and, in particular, his statement to the respondent's father that he had not spoken to the respondent for a whole year, afford any corroboration in a material particular of the evidence of the respondent, and therefore, in my opinion, the appeal should be allowed.

AVORY J. In this case the child was born on December 29, 1932, and the probability of conception, therefore, was at the end of March. It was the respondent's case that connection took place on March 31, 1932, and that was the only occasion. In view of this fact, and that there was no independent evidence of the parties being seen together on that date, it is necessary, in my opinion, to criticize closely the alleged evidence of corroboration of the respondent's evidence in some material particular. The justices rely on four matters as corroboration in material particulars. In No. 1 they say: "According to the respondent's evidence (which we accepted) the respondent had two interviews with the appellant with respect to her condition—the first on May 20, 1932 (within two months of the date of conception), and the next on or about July 22, 1932 (after the respondent had seen the doctor). The fact that such interviews took place was proved to our satisfaction by the evidence called both by the respondent and the appellant." In No. 2 they say: "We were greatly impressed by the evidence (which we accepted) of the respondent's father to whom the appellant denied that he had spoken to the respondent for a whole year, which, in our judgment, was untrue, and to whom he made a conditional promise to come down to meet the respondent which promise he did not keep." In No. 3 they say: "But what impressed us more than anything was the untruthful suggestions made on the appellant's instructions to the respondent, and what we regarded as the untruthful evidence given on his own behalf in support of those suggestions. In our judgment the appellant and certain witnesses had agreed to give false evidence concerning the respondent in order to defeat the respondent's application, and we could not but view his denial of the respondent's evidence in the light of this fact, and regard his whole conduct in the matter as strong corroboration of the respondent's evidence." In No. 4 they say: "The appellant, in cross-examination, said he had asked the respondent's father to name the respondent's witnesses, although, according to him, the appellant, he knew there were no witnesses." With regard to No. 1, which is relied upon, that means merely that they believed the respondent's evidence, and disbelieved the appellant's evidence, and affords no corroboration. With regard to No. 3, which they say impressed them more than anything, that means that the appellant's conduct in putting forward a defence which they did not believe, afforded corroboration. It might just as well be said that the appellant's denial on oath that he was responsible for her condition afforded corroboration of the respondent's evidence. I see no ground for saying that there was a conspiracy between the appellant and the witnesses for the defence to give false evidence. No. 4 calls for no comment. It clearly did not afford corroboration.

It remains to consider No. 2, and on behalf of the respondent it is contended that the case of *Mash* v. *Darley* (1) supports the finding of the justices, and that it is further supported by the decisions in the Scottish Courts. The case of *Mash* v. *Darley* (1) is, of course, binding upon us in any case where the facts are similar, but I do not think it is any authority for saying that an untruth told by the appellant before the hearing of itself affords corroboration, nor do the Scottish decisions, in my opinion, affirm any such proposition.

I agree with my brother Lawrence on the effect of those decisions, which I have had the opportunity of reading in his judgment, and in the result I am of opinion that there was no corroboration of the respondent's evidence in any material particular to justify the decision of the justices.

LAWRENCE J. I am of the same opinion. The corroboration relied upon was, first, that there was independent evidence that the appellant had met the respondent on May 20, 1932, and on July 22, 1932, on which occasions the respondent alleged that she had informed the appellant of her pregnant condition. As the independent evidence does not in any way tend to confirm the respondent's account as to what passed at these interviews, I am of opinion that it is not evidence which in any material particular makes it more probable than not that the appellant is the father of the child, and is, therefore, not corroborative evidence within the section.

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(1) [1914] 3 K. B. 1226, 1231.

The second head of corroboration relied upon was that the respondent's father gave evidence of an interview with the appellant at which he accused the appellant of being the father, and, as he alleged, the appellant, whilst denying paternity, denied that he had spoken to the respondent for a whole year. This evidence of the respondent's father was accepted by the justices, and as the appellant's evidence before them was that he had spoken to the respondent both on May 20, 1932, and on July 22, 1932, it must be taken that the appellant made an untruthful statement to the respondent's father when accused by him of the paternity. I am of opinion that this evidence is not sufficient corroboration to support the decision.

Much reliance was placed before us upon two cases in the Court of Session, *Dawson* v. *McKenzie* (1) and *McWhirter* v. *Lynch* (2), in the former of which Lord Dunedin said (1): "Now, the mistake which the learned sheriff has made here is in taking the mere proof of opportunity as amounting to corroboration. Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is, that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration. The other is, that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made." It is, in my opinion, clear that Lord Dunedin meant by "a proved opportunity" on which the alleged father's untrue denial might put a complexion of suspicion an opportunity proved by evidence other than that of the mother.

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(1) 45 S. L. R. 473, 474.

(2) 46 S. L. R. 83.

Now in the present case the only connection alleged was on March 31, 1932, and the meeting at which connection was alleged to have taken place was proved only by the evidence of the mother, and not by any independent evidence. In these circumstances I do not think that a denial by the appellant which is only shown to be untrue by independent evidence with reference to two meetings after conception can be regarded as corroboration within the dictum of Lord Dunedin. As Avory J. pointed out in *Thomas* v. *Jones* (1), a disbelief of the alleged father's evidence where it is in contradiction of the mother's testimony does not afford corroboration of that testimony.

There is no doubt that any untrue statement by a person when accused of an offence gives rise to some suspicion, but there is no authority which suggests that every untrue statement by an alleged father is corroborative of the mother's evidence, and the Court of Session expressly disclaimed any such view. And where, as here, the untrue statement is only shown to be untrue by the proof of incidents (namely, the meetings of May 20 and July 22, 1932) which, so far as the independent evidence goes, were perfectly innocent, I do not think it is corroboration within the meaning of the section.

The third head of corroboration was the suggestions in cross-examination made on the appellant's behalf to the respondent, and the evidence of the appellant and his witnesses, which the justices disbelieved.

It was attempted to support this head of corroboration by the observations of Buckley L.J. (as he then was) in the case of *Mash* v. *Darley* (2), but in my judgment that case is clearly distinguishable. There the alleged father had been

(1) [1920] 2 K. B. 399, 409.

(2) [1914] 3 K. B. 1226, 1231.

tried and convicted for having unlawful carnal knowledge of the mother, and attacked the mother's character before the committing justices, but on his trial made no such attack. When bastardy proceedings were subsequently instituted all that Buckley L.J. held was that his conduct in first attacking the mother's character, and then refraining from doing so, might be treated as corroboration. In the present case the justices have relied most strongly upon the case put forward by the appellant and his witnesses in the bastardy proceedings which they disbelieved as corroborating the mother's evidence. It appears to me that if this is corroboration any case put forward by an alleged father which is disbelieved may be regarded as corroboration of the mother's evidence. It may be suggested that the fact that the appellant told a different story in the witness-box to what it must be assumed he told to the respondent's father is a similar change of front to that considered by Buckley L.J., but in my view the facts are distinguishable, and it would be unsafe to treat as corroboration in every case every inconsistency between the alleged father's evidence and what he is held to have said on previous occasions. Moreover, if, as the Lord Justice-Clerk said in the case of *Macpherson* v. *Largue* (1), and Lord Dunedin approved in *Dawson* v. *McKenzie* (2), the appellant's evidence, if disbelieved, ought to be taken out of the case, the change of front disappears.

The last head of corroboration is in my view obviously unsound, and was not supported in argument.

I am, therefore, of opinion that there was no sufficient corroboration of the respondent's evidence, and that the appeal must be allowed.

*Appeal allowed.*

Solicitors for the appellant: *Churchill, Clapham & Co.*

Solicitors for the respondent: *Rhys Roberts & Co., for Guthrie Jones & Jones, Dolgelley.*

(1) (1896) 23 R. 785.

(2) 45 S. L. R. 473.

T. W. M.

# THE KING *v.* BEDWELLTY URBAN DISTRICT COUNCIL.

1933
*Nov.* 7.

## *Ex parte* PRICE.

*Local Government—Accounts of Urban District Council—Audit—Right of "person interested" to inspect books and accounts—Inspection by Agent—Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 247, *sub-s.* 4.

A ratepayer in an urban district, who was also the secretary of the local ratepayers' association, appointed an accountant, who was not a ratepayer in the district, to inspect with him the books and accounts of the local authority under s. 247, sub-s. 4, of the Public Health Act, 1875, and to report to the association thereon. The officers of the Council permitted the accountant to inspect all the books and accounts to which s. 60 of the Rating and Valuation Act, 1925 (which expressly authorizes inspection by an agent of the ratepayer), applied, but they declined to permit him to inspect the general books and accounts of the Council, on the ground that he was not himself a "person interested," and that s. 247 of the Act of 1875 did not authorize a person interested to inspect by an agent. The books and accounts were produced to the ratepayers themselves:—

*Held*, that a person interested was entitled under s. 247, sub-s. 4, of the Public Health Act, 1875, to inspect by an agent, and that a rule for mandamus commanding the Council to permit the accountant to inspect the books, must be made absolute.

The remedy by prosecution of the officers of the Council under s. 247, sub-s. 4, was not "equally convenient, beneficial and effectual" since it would not result in giving inspection of the books.

Reasoning of Parker J. in *Norey* v. *Keep* [1909] 1 Ch. 561, at p. 565, applied.

RULE NISI for mandamus.

This was a peremptory rule calling on the Urban District Council of Bedwellty, Monmouthshire, to show cause why a writ of mandamus should not issue commanding them to permit Mr. Benjamin Llewellyn Phillips, an accountant, acting on behalf of Mr. Walter Price, the applicant, and other ratepayers in the urban district, to inspect the accounts together with all account books deeds contracts accounts vouchers and receipts mentioned or referred to in such accounts of the Council for the year ended March 31, 1933, on the grounds (i.) that the said Phillips was a person interested within the meaning of s. 247, sub-s. 4, of the Public Health Act, 1875 (1), as being agent for the said Walter Price and other ratepayers ; (ii.) that the said Walter Price was a person interested, and was entitled to inspection by an agent acting on his behalf.

The books and accounts of the Bedwellty Urban District Council for the year ended March 31, 1933, were open to the inspection of all persons interested from September 11 to September 18, 1933. Mr. Walter Price, a ratepayer in the district, and the secretary of the New Tredegar and District Rent and Ratepayers' Association, instructed Mr. Benjamin Llewellyn Phillips, an Incorporated Accountant, practising in Cardiff, to accompany Mr. Price and other members of the Association to inspect the books of the Council and report on them to the Association. Mr. Phillips himself

(1) By the Public Health Act, 1875, s. 247 :—

"Where an urban authority are not the council of a borough the following regulations with respect to audit shall be observed ; (namely,)

(1.) The accounts of the receipts and expenditure under this Act of such authority shall be audited and examined once in every year, as soon as can be after the twenty-fifth day of March, by the auditor of accounts relating to the relief of the poor. . . . .

(3.) Before each audit such authority shall, after receiving from the auditor the requisite appointment, give at least 14 days' notice of the time and place at which the same will be made, and of the deposit of accounts required by this section, by advertisement in some one or more of the local newspapers circulated in the district . . . .

(4.) A copy of the accounts duly made up and balanced, together with all rate books account books deeds contracts accounts vouchers and receipts mentioned or referred to in such accounts, shall be deposited in the office of such authority, and be open, during office hours thereat, to the inspection of all persons interested for seven clear days before the audit, and all such persons shall be at liberty to take copies of or extracts from the same, without fee or reward ; and any officer of such authority duly appointed in that behalf . . . . refusing to allow inspection thereof, shall be liable to a penalty not exceeding five pounds.

(6.) Any ratepayer or owner of property in the district may be present at the audit, and may make any objection to such accounts before the auditor ; and such ratepayers and owners shall have the same right of appeal against allowances by an auditor as they have by law against disallowances."

Sect. 60, sub-s. 1, of the Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), provides that "any ratepayer . . . . may . . . . inspect and take copies of and extracts from" the books and documents therein mentioned.

Sub-s. 4 : "For the purposes of this section the expression 'ratepayer' includes . . . . any person authorised by a ratepayer to act on his behalf under this section."

was neither a ratepayer nor an owner of property in the Bedwellty Urban District.

On September 11 Mr. Phillips and Mr. Price with other ratepayers attended at the Council offices, and on that occasion the deputy accountant, in the absence of the accountant, declined to allow Mr. Phillips to inspect the books, as he was not sure whether Mr. Phillips was a person interested, but the ratepayers were allowed to do so and were given facilities for copying any data they desired. On September 12 Mr. Phillips again attended and saw the accountant, who told him that immediate inspection would be given him of all documents and accounts of the rating authority to which s. 60 of the Rating and Valuation Act, 1925, applied, but that he could not allow Mr. Phillips to inspect the general accounts of the Council without submitting the application to the Council. At their meeting on the same day, September 12, the Council resolved that Mr. Phillips should not be allowed to inspect the general accounts. This decision was communicated to Mr. Phillips when he again attended and repeated his application on September 13. He was in fact allowed to examine the books within s. 60 of the Rating and Valuation Act, 1925, and the ratepayers were at all times allowed to examine all the books and accounts and were furnished with any information for which they asked.

The reason, as appeared from the affidavits filed in opposition to the rule, why the Council were unwilling to allow Mr. Phillips to inspect the general accounts, was that the Council were gas and electricity undertakers in parts of their area, and were also, under statutory authority, partners in an omnibus undertaking which served the area. They considered that it would be detrimental to the interests of their ratepayers to disclose the financial details of these undertakings to an accountant, not himself interested as a ratepayer or property owner, who might possibly be professionally consulted by rival undertakings or by companies wishing to enter into negotiations for the acquisition of one or other of these undertakings. Such negotiations were, in fact, contemplated with regard to the omnibus service.

This rule was then applied for.

*Croom-Johnson K.C.* and *Roskin* showing cause for the Council. The points on which we rely are these: (1.) that the books have already been produced to the applicant and others with him who are ratepayers; (2.) that there is nothing in this legislation which compels the local authority to produce the books more than once to the same person interested. It is, of course, conceded that the production must not be colourable, but must afford an opportunity for full inspection; (3.) that the Council are not bound to produce the books to an agent; (4.) that even if the Council is bound to allow inspection by an agent in general it is not bound to do so when the principal has already had full inspection; (5.) that, at all events, in the discretion of the Court this rule ought not to be made absolute, because (*a*) on the facts there is no wrong to remedy. The Court has refused mandamus unless it appeared that the person interested was likely to be damaged; (*b*) there is an alternative and convenient remedy by proceeding against the officials responsible; (*c*) the seven clear days appointed for inspection having expired, it is too late for the Court to interfere.

There is no direct authority. In *Marginson* v. *Tildsley* (1) a bankrupt member of the Council was held to be a person interested, on the ground that a surcharge might be the subject of a proof in his bankruptcy. That case arose out of the prosecution of an officer for refusing to produce the accounts, but when, later on, the same man required inspection, and was again refused on the ground of undue delay, the Court declined to grant mandamus, on the ground that it was too late: *Rex* v. *Fleetwood U. D. C.* (2) Here the "seven clear days" prescribed by the Act expired on September 18. No order which the Court might make could now enable Mr. Phillips to inspect the books during those days. The object of giving those days before the audit was that the ratepayer might acquaint himself with the accounts before he appeared at the audit to make any objections which he thought proper. It is now too late, and mandamus ought to be refused on that ground.

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(1) (1903) 67 J. P. 226.

(2) (1904) 68 J. P. 314.

[AVORY J. Why should we not make the order nunc pro tunc? It is commonly done, and the audit, we are informed, is being kept open pending our decision.]

Your Lordships have undoubtedly power to do it; it is a matter of discretion. That discretion should not be exercised in favour of the applicant, since he has an equally appropriate and convenient remedy by prosecuting the officers who refused to produce the books.

[AVORY J. How is that equally appropriate and convenient? To fine the officers would bring the applicant no nearer to an inspection of the books by Mr. Phillips.]

There is no hardship in refusing the rule, for the applicant has a simple way out of his difficulty by appointing as his agent an accountant who is himself a ratepayer or owner of property in the district.

*Montgomery K.C.*, *W. C. Howe*, and *W. A. Prichard* for the applicant, supporting the rule. It is quite usual for a person interested to appear before the auditor by an agent; no Court has ever held that that is wrong, and it would seem that the agent must be entitled to acquaint himself with the accounts in order to discharge his duty to his principal at the audit.

Sect. 60 of the Rating and Valuation Act, 1925, is of much more limited scope; it deals with the revenue side of the Council's accounts and does not touch the expenditure side. It is not to be inferred, because a later Act has expressly allowed an agent, that an earlier Act, which is silent on the point, excludes the agent. It may be that the draftsman of the later Act thought it well to eliminate any sort of doubt on the matter.

It is true that there is no direct authority, but the necessity for allowing a skilled agent, if the right of inspection is not to be illusory, is dealt with in the trade union case of *Norey* v. *Keep* (1), where Parker J. said: "In considering whether a right of this kind is a personal right, or a right which can be exercised by means of an agent, it is important to consider with what object the right is conferred. Now it appears to me, both from the statute and from the rules, that the object is to enable the members, when they think that there is something wrong in the accounts of a society, to satisfy themselves whether anything is wrong or whether all is right by an inspection of the books. And when one considers that members of a society of this kind are not by reason of their training, any more than I am, really competent to examine the accounts or to obtain proper information from them, it is plain that the object with which the right of inspection is conferred by the Legislature and by rules would be almost if not entirely defeated if the right were held to be a personal right only."

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(1) [1909] 1 Ch. 561, 565.

AVORY J. This rule was obtained on October 24 calling on the Urban District Council of Bedwellty to show cause why a writ of mandamus should not issue commanding them to permit Benjamin Llewellyn Phillips, an accountant acting for and on behalf of Walter Price and other ratepayers, to inspect the accounts, together with all account books deeds contracts accounts vouchers and receipts mentioned or referred to in such accounts of the Council for the year ended March 31, 1933, on the grounds, firstly, that Mr. Phillips was a person interested within the meaning of s. 247, sub-s. 4, of the Public Health Act, 1875, as being agent of the said Mr. Price and other ratepayers, and secondly that Mr. Price is a person interested and entitled to inspection by a person acting on his behalf.

In my opinion, the rule should be made absolute on the second ground, without deciding whether Mr. Phillips, the accountant, can properly be described as a person interested within the meaning of s. 247. But I think that Mr. Price is clearly a person interested and entitled to inspection by an agent acting on his behalf. Mr. Croom-Johnson has taken several points in showing cause against this rule: First, he takes the point that the books and accounts have in fact been produced to Mr. Price and another ratepayer and that

that should be sufficient to satisfy the requirements of sub-s. 4 of s. 247. I think that that point is met by the last paragraph of the affidavit of Mr. Price, confirmed as it is by the similar paragraph in the affidavit of Mr. Phillips, in which they state that, owing to the complexity of the accounts and the technical manner in which they are prepared, no one who is not a fairly expert accountant can effectively inspect them, or extract from them the information which might support an objection before the auditor.

That view is expressly confirmed in the judgment of Parker J. in the case to which we have been referred, *Norey* v. *Keep*. (1) The passage which has been read by Mr. Montgomery, where the learned judge, dealing with a somewhat analogous provision in the Trade Union Act as to the right of inspection of the books of the trade union by any person having an interest in the funds, said, in effect (I will not re-read the passage), that the question is, whether the right of that nature which has been conferred is a personal right or a right which can be exercised by means of an agent; and he points out that it is in order to determine that point that the Court considers with what object the right was conferred. He came to the conclusion in that case that the particular person on whom the right was conferred would be incompetent to examine the accounts and obtain information from them, and that the object of inspection would entirely be defeated if the right were not extended to the employment of a skilled agent for the purpose. That case and the reasoning in it appear to me applicable here.

The two other points taken by Mr. Croom-Johnson were, first, with reference to the difference in the language used in s. 60 of the Rating and Valuation Act, 1925, which deals with the right of ratepayers to inspect and take copies of rate-books, valuation lists, etc.; for, in sub-s. 4 of that section, it is stated: "For the purposes of this section the expression 'ratepayer' includes an occupier who pays a rent inclusive of rates, and also includes any person authorised by a ratepayer to act on his behalf under this section."

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(1) [1909] 1 Ch. 561, 565.

I do not think that the fact that a later statute passed in 1925 gives an express authority to the ratepayer to employ an agent is any sufficient ground for holding that the right of inspection conferred by the Public Health Act, 1875, is a personal right only, and, for the reasons given by Parker J., it appears to me that it is a sufficient answer to say that a subsequent statute has, in order to remove all doubt, expressly authorized the ratepayer to employ an agent.

The other point taken was that this remedy ought not to be granted, because another remedy is provided by statute —namely, that under s. 247, sub-s. 4, where it is enacted that any officer of such authority neglecting or refusing to allow inspection shall be liable to a penalty not exceeding 5*l.* I cannot see that a proceeding against an officer of the Council in this case would be an equally convenient, beneficial and effectual remedy, because it would not follow, if a fine were imposed, that the ratepayer would be any nearer obtaining the inspection which he desired, and it would not follow from the imposition of any such fine that the inspection by the agent would be allowed. Therefore I think that point also fails as a reason for not making this rule absolute, with the result that the rule will be made absolute on the second ground.

Charles J. Mr. Walter Price was a ratepayer in the Bedwellty Urban District, and also happened to be the secretary of the New Tredegar and District Rent and Ratepayers' Association, and he desired, as was his undoubted right as a ratepayer, to make an examination and inspection of the books documents contracts accounts vouchers and receipts referred to in s. 247, sub-s. 4, of the Public Health Act, 1875. He went himself, and did make some sort of examination of these books and documents; but he discovered, as he tells us upon affidavit, that the way in which the accounts were made up was complicated, that he could not make any useful or satisfactory inspection of the books by himself. He therefore applied that Mr. Phillips should come with him in order that he might lend his skilled powers to examine the accounts for the Association and as their agent, or for him and as his agent. When Mr. Price and Mr. Phillips arrived for the purpose of Mr. Phillips making that inspection and of Mr. Price exercising what he believed to be his proper rights, the officer in charge of the books said he was doubtful whether Mr. Phillips was a person who could be called a person interested under s. 247, sub-s. 4. He referred them to his immediate superior, who considered that Mr. Phillips was not a person interested.

In those circumstances the matter comes before this Court, and we are asked to decide whether or not Mr. Phillips could be called a person interested, that is a person interested as the agent of Mr. Price. It has been urged upon us that there is nothing in the sub-section to which I have referred which compels a local authority to produce books to an agent or to allow him to look at them, and Mr. Croom-Johnson has prayed in aid in support of that argument the fact that in the Rating and Valuation Act, 1925, by s. 60, sub-s. 4, the specific authority is not only to a ratepayer but also to any person authorized by the ratepayer to make examination of the books under that section, and we are asked to say that the allowance to a ratepayer to appear by an agent is, in the absence of any specific reference, not to be held as implicit in s. 247, sub-s. 4, of the Public Health Act, 1875.

So far as I am concerned—and I agree with the judgment given by my Lord—I think it is quite clear that the whole purpose of the section would be defeated if only the ratepayer were allowed to inspect, without a skilled person at his elbow to act as his agent for the inspection. The matter has been discussed in reference to trade union books in the case of *Norey* v. *Keep* (1), to which we have been referred, and an examination of Parker J.'s judgment makes it quite clear that, in his opinion, as indeed in my own, it is quite impossible to limit such inspection to a personal right, if it is necessary, in order to make a proper inspection, to inspect by a skilled agent. There is nothing in the section to say it may not be done; further than that, I would say that it may be impossible for the purpose of the section to be fulfilled without skilled assistance. I therefore agree that Mr. Price is a person interested and entitled to inspect by his agent, Mr. Phillips.

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(1) [1909] 1 Ch. 561, 565.

As to the proposition that the alternative remedy under s. 247, sub-s. 4, is a remedy which could be regarded as equally convenient and effective as the remedy now sought before this Court: the remedy is that the officer of such authority duly appointed, if he refuses to allow the inspection of the books under this section to a person interested, shall be liable to a penalty not exceeding *5l.* It appears to me that if that remedy were pursued to its ultimate end and the full penalty imposed, it still would not be an equally convenient remedy, but would, instead, be entirely ineffectual from the point of view of the parties now before us. I therefore agree that this rule should be made absolute.

LAWRENCE J. I agree, and I only desire to add this: Mr. Croom-Johnson argued that nothing compelled a local authority to produce the books more than once. I do not think there is anything in that point, and, in any event, the facts do not support it, because Mr. Phillips went with Mr. Price on the first occasion and was then refused inspection of the books. Otherwise, I have nothing to add.

*Rule absolute.*

Solicitors for the Council: *John T. Lewis & Woods, for W. D. R. Lewis, Clerk to the Bedwellty Urban District Council.*

Solicitors for the applicant: *Willis & Willis, for Gilling & Goodfellow, Cardiff.*

J. W. H.

## LAW SOCIETY *v.* UNITED SERVICE BUREAU, LIMITED.

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*Nov.* 8, 9.

*Solicitor—Pretending to be a Solicitor—Pretence by unqualified person—Body corporate—Solicitors Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 46.

Sect. 46 of the Solicitors Act, 1932, provides that "any person, not having in force a practising certificate, who wilfully pretends to be . . . . qualified . . . . to act as a solicitor" shall be liable to a penalty.

The words "any person" in this section do not include a body corporate, such as a limited company, and a body corporate cannot, therefore, be convicted of an offence under the section.

*Pharmaceutical Society* v. *London & Provincial Supply Association, Ld.* (1880) 5 App. Cas. 857 applied.

*Quaere,* per Lawrence J., whether a company could legally be formed to carry on the business of a solicitor.

Case stated by Metropolitan magistrate.

At a court of summary jurisdiction held at Marlborough Street Police Court, London, the appellants, the Law Society, preferred two informations against the respondents, a limited company, named United Service Bureau, Ld., under s. 46 of the Solicitors Act, 1932 (1), charging the respondents with having wilfully pretended to be qualified, or recognized by law as qualified, to act as solicitors.

The respondents did not have in force a practising certificate under s. 43 (1) of the Act.

The magistrate held that the words "any person" in s. 46 did not include a limited company such as the respondents, and he therefore dismissed the information.

The appellants appealed.

*Roland Burrows K.C.* and *W. M. Andrew* for the appellants. The Solicitors Act, 1932, has to be read in the light of ss. 2 and 19 of the Interpretation Act, 1889. (1) No person can

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(1) Sect. 43 of the Solicitors Act, 1932, provides: "No person shall be qualified to act as a solicitor unless his name is on the roll and he has in force a duly stamped practising certificate, and a person who is not so qualified is in this Part of this Act referred to as an 'unqualified person.'"

Sect. 46 provides: "Any person, not having in force a practising certificate, who wilfully pretends to be . . . . qualified or recognised by law as qualified to act as a solicitor, practise as a solicitor unless he is qualified under s. 14 of the Act of 1932. On attaining the required qualification a person takes out a certificate and is admitted to practise by the Master of the Rolls: see s. 3. It is quite clear that a body corporate is not a " person " who can become qualified to practise, for it cannot serve articles of clerkship nor sit for the final examination, but some other clauses of the Act are of much wider interpretation. It has always been assumed, for instance, that a limited company is a " person " who can make an application under s. 5 to strike a solicitor off the Roll. Sect. 43 divides persons into two classes, solicitors and unqualified persons. A company is in the latter class, and the same interpretation must be given to the word " person " where it occurs in ss. 45, 46, 47, 51 of the Act. Unless s. 51 applies to a limited company, all that is necessary for an unqualified person who desires to be " covered " is for him to form a limited company and for the solicitor to " cover " the company. Support is given to this argument by s. 77, which contains a special saving for the solicitor to the Treasury, who is a statutory corporation sole.

For the purpose of a charge of " wilfully pretending to be a solicitor " it does not matter whether the " person " is a company or an individual. The Act was passed for the protection of the public, and especially of the ignorant section of the public, who would not know that the qualifications of a solicitor were such as to exclude a company. There is, it is true, some authority for the proposition that, if a statute contains a prohibition subject to a condition which can only be fulfilled by an individual and not by a corporation, the prohibition itself strikes at individuals and not corporations. But here the words " not having in force a practising

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shall be liable on summary conviction to a penalty not exceeding 10*l*. for each such offence."

Sect. 2, sub-s. 1, of the Interpretation Act, 1889, provides: " In the construction of every enactment relating to an offence punishable on indictment or on summary conviction . . . . the expression ' person ' shall, unless the contrary intention appears, include a body corporate."

Sect. 19 provides: " In this Act and in every Act passed after the commencement of this Act [January 1, 1890] the expression ' person ' shall, unless the contrary intention appears, include any body of persons corporate or unincorporate."

certificate " are redundant, for a person who has a practising certificate could not pretend to be that which in fact he is. In *Pharmaceutical Society* v. *London & Provincial Supply Association, Ld.* (1) it was held that a company, one of whose members only was a qualified person, was not liable to a penalty under s. 1 of the Pharmacy Act, 1868, but that the actual sale must be by a qualified person ; but there is no section in the Pharmacy Act, 1868, equivalent to s. 51 of the Solicitors Act, 1932.

There is in the Solicitors Act, 1932, ground for saying that it was the policy of the Legislature that all profits made by persons acting as solicitors should be received by duly qualified solicitors, and that no one else should intermeddle with that kind of business. The law of champerty and maintenance also shows that purpose. If that were not so, a company might be formed, all the shareholders in which might be unqualified persons, and no legal steps could be taken to prevent it, unless, perhaps, they actually assumed conduct of an action, when they might be subject to proceedings for contempt.

Where a statute absolutely prohibits an act, then a company may be liable for the acts of the individual who does the prohibited act in its name : *Mousell Bros., Ld.* v. *L. & N. W. Ry. Co.* (2) The mischief of the Solicitors Act, 1932, being to protect the public from being deceived into thinking that they are dealing with a qualified person, when in fact they are not, the Act applies equally whether the unqualified person is a corporation or an individual. It is not till the year 1933 that it is suggested that a company can act as a solicitor or be " covered " by a solicitor, who may walk with head erect, while if the person " covered " had been one of the shareholders in the company the solicitor would have been struck off the Roll compulsorily.

*Strauss* for the respondents. The real question is whether " a contrary intention appears " within the meaning of s. 2 of the Interpretation Act, 1889. It is submitted that it amply appears, on two grounds : (1.) if a qualification which

(1) 5 App. Cas. 857. (2) [1917] 2 K. B. 836.

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can only be possessed by an individual is demanded by a statute, then the prohibition against doing an act without that qualification is also directed against individuals; (2.) mens rea is essential to the offence, and a corporation cannot be capable of mens rea, except in the comparatively few cases where an absolute duty is imposed, in which case it is enough to establish the particular state of mind in the company's agent.

It is obvious from the terms of s. 46 itself that it does not apply to a company, since it refers to " not having in force a practising certificate," a thing which it is impossible for a company to have. In s. 51, too, " person " cannot be meant to include a company, since, in sub-s. 3, such a person may be imprisoned and a company cannot be imprisoned.

Questions analogous to the present have fallen for decision under the Pharmacy Act, 1868, s. 1, the Dentists Act, 1878, s. 3, and the Veterinary Surgeons Act, 1881, in *Pharmaceutical Society* v. *London & Provincial Supply Association* (1): *O'Duffy* v. *Jaffé, Ld.* (2): *Attorney-General* v. *Churchill's Veterinary Sanatorium, Ld.* (3) It is not suggested that no distinction can be drawn between those statutes and the Solicitors Act, but it is submitted that the effect of each is that a corporation is not within the appropriate section. It is stated in Stiebel on Companies, 3rd ed., p. 47, that a company cannot be prosecuted for offences under the Pharmacy Act or the Dentists Act.

It is not surprising that Parliament did not contemplate a company pretending to be a solicitor, for obviously a memorandum including such an object would be refused registration. If a company acted as a solicitor without any justification on the face of its memorandum it would be restrained at the suit of the Attorney-General, and an individual acting for such a company could not get far without exposing himself to penalties under one or other of the sections of the Act.

Whenever this question has arisen the test applied has always been whether a special qualification is required which cannot be possessed by a corporation.

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(1) 5 App. Cas. 857.

(2) [1904] 2 I. R. 27.

(3) [1910] 2 Ch. 401.

[He cited *Hereford Corporation* v. *Morton.* (1)]

Unless the Court disregards the decision in *Pharmaceutical Society* v. *London & Provincial Supply Association, Ld.* (2), they cannot hold that a company falls within s. 46 of the Act of 1932.

On the second point, a corporation is incapable of mens rea, and most of the cases in which corporations have been held criminally liable have been those in which mens rea is not required. See, especially, per Lord Alverstone C.J. and Channell J. in *Pearks, Gunston & Tee, Ld.* v. *Ward* (3); *Hawke* v. *Hulton (E.) & Co., Ld.* (4); *Chuter* v. *Freeth & Pocock, Ld.* (5); and Halsbury's Laws of England, 1st ed., vol. ix, § 503. Under the Solicitors Act, not only is it impossible for a company to be qualified, but s. 46 makes it quite clear that mens rea is the essence of the offence. *Mousell Bros., Ld.* v. *L. & N. W. Ry. Co.* (6) does not derogate from the principle that a company cannot have mens rea. Atkin J. in that case decided only that, there being an absolute duty, no mens rea in the company was necessary if the agent had the state of mind required. See also *Griffiths* v. *Studebakers, Ld.* (7) "Wilfully" means that the act is done deliberately and intentionally: see per Lord Russell C.J. in *Reg.* v. *Senior* (8) and connotes intention by an individual.

*Burrows K.C.* replied.

AVORY J. The question whether the expression "any person" in s. 46 of the Solicitors Act, 1932, includes a corporation or a limited company involves the further inquiry, under s. 2 of the Interpretation Act, 1889, whether there is in the Act anything which would indicate a contrary intention.

In my view, the words in s. 2 of the Interpretation Act, 1889, "unless the contrary intention appears," merely embody the principle laid down by the House of Lords in *Pharmaceutical Society* v. *London & Provincial Supply Association.* (1) Lord Selborne L.C. there said (2): "I think the principle laid down by the junior counsel for the respondents was substantially right; that if a statute provides that no person shall do a particular act except on a particular condition, it is, prima facie, natural and reasonable (unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter, to exclude that construction) to understand the Legislature as intending such persons, as, by the use of proper means, may be able to fulfil the condition; and not those who, though called 'persons' in law, have no capacity to do so at any time, by any means, or under any circumstances, whatsoever." That principle is very succinctly stated by Lord Blackburn in applying it to the Act which was then under discussion. He said (3): "The Act then goes on, in the first section, which is I think really very important, to say that 'it shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title of chemist and druggist, or chemist or druggist, or pharmacist, or dispensing chemist or druggist, in any part of Great Britain, unless such person shall be a pharmaceutical chemist, or a chemist and druggist.' Now, my Lords, standing there, it does seem to me, though without laying down any technical rule, that the plain meaning of the words is, and they are used in this sense—such a person as could become a pharmaceutical chemist. A corporation could not; an individual can. It seems to me, therefore, that the Act plainly says in the first section, 'It shall be unlawful to sell or keep open shop or assume the name of a chemist or druggist for any person,' that is to say, any natural person, 'unless he becomes a pharmaceutical chemist.'"

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(1) (1857) 15 L. T. 187.
(2) 5 App. Cas. 857.
(3) [1902] 2 K. B. 1, 8, 11.
(4) [1909] 2 K. B. 93.
(5) [1911] 2 K. B. 832.
(6) [1917] 2 K. B. 836.
(7) [1924] 1 K. B. 102.
(8) [1899] 1 Q. B. 283, 290.

Applying the principle there laid down, it seems to me that s. 46 of the Solicitors Act, 1932, must be held to contemplate a person who can have in force a practising certificate as a solicitor. By s. 43 the possession of such a certificate

(1) 5 App. Cas. 857. (2) Ibid. 862. (3) Ibid. 871.

is an essential condition to the qualification of any one to act as a solicitor. A person not so qualified is referred to as an "unqualified person." It is clear beyond possibility of argument that a corporate body cannot pass the final examination provided for by the Act and, therefore, cannot apply to be admitted as a solicitor, or be so admitted, within s. 3 of the Act. Being incapable of being admitted as a solicitor, a corporate body, it is obvious, cannot be qualified under s. 43 and cannot have in force the practising certificate mentioned in s. 46. In my opinion, therefore, the respondent company in this case cannot be brought within the words "any person" in s. 46.

I quite recognize the force of Mr. Burrows's argument that, in adopting this construction, we are not giving full effect to considerations based on the mischief which is aimed at by this Act and particularly by s. 46 of it, because I do not doubt that a corporate body is capable of wilfully pretending to be qualified to act as a solicitor.

Mr. Strauss has taken two points in support of the magistrate's decision. The first is that the qualification contemplated by s. 46 can only be possessed by a natural person. With that I have already dealt. The second is that the words "wilfully pretends" in s. 46 could have no application to a corporate body because "wilfully" involves some mens rea which a corporate body cannot have. I think that that point fails and that a corporate body might "wilfully pretend" within the meaning of s. 46 to be qualified to act as solicitors. It has been laid down over and over again that where a statute absolutely prohibits the doing of an act it is sufficient to show that the person accused did the forbidden act intentionally and that it is not necessary to go further and prove what is commonly known as mens rea or any intention other than to do the thing forbidden. I am satisfied that the "wilful pretence" required by s. 46 is satisfied by evidence that the person accused intentionally did that which the Act forbids.

Mr. Burrows has laid great stress on the provisions of s. 51, which is intended to provide against what is commonly called the "covering" of an unqualified person by a solicitor. There is no doubt, if I am right in the construction which I have put on s. 46, that s. 51 could not be applied to a case where the solicitor was acting as "cover" to a corporate body which was pretending to be a solicitor. But s. 51 itself, in sub-s. 3, seems clearly to contemplate that the unqualified person mentioned in sub-s. 1 is a natural person and not an artificial person such as a corporation, because sub-s. 3 provides that the unqualified person in such a case shall, if the solicitor is struck off the Roll for an offence under the section, be liable to imprisonment without any alternative remedy by way of a fine. That clearly cannot be applied to a corporate body. I come to the conclusion therefore that the real reason of the difficulties created by the position to which I have referred is that the Legislature overlooked the fact that a corporate body might do that which is forbidden by s. 46. In other words, there is nothing in the Act which deals with such a case as the present, where it is alleged that a corporate body has pretended to be qualified to act as a solicitor.

For these reasons I have come to the conclusion that this appeal must be dismissed.

CHARLES J. I agree. I entirely concur with all my Lord has said on the question of mens rea and I do not propose to add anything to his observations on that point, which is, perhaps, a little aside from the real issue.

The real issue is whether s. 46 of the Solicitors Act, 1932, when it refers to "any person" includes in the word "person" a body corporate. Mr. Burrows has based an argument on s. 2 of the Interpretation Act, 1889, which provides: "In the construction of every enactment relating to an offence punishable on indictment or on summary conviction . . . . the expression 'person' shall, unless the contrary intention appears, include a body corporate." His argument is that, when one looks at the purpose of the Solicitors Act, 1932, and the terminology of s. 46 itself, there is nothing to indicate that any contrary intention appears which would cause the word "person" to connote a natural person alone and not an artificial person such as a body corporate. We have been referred to a great many cases which have been decided on the definition of the word "person" in other Acts, and the argument has been rather based on analogy. We have been referred to the Dentists Act, 1878, the Veterinary Surgeons Act, 1881, and in particular to the Pharmacy Act, 1868, which was discussed in *Pharmaceutical Society* v. *London & Provincial Supply Association, Ld.* (1) In all the cases decided under those Acts it was held that a limited company was not a "person" within the meaning of the Act under discussion and that "person" meant natural person. In *Pharmaceutical Society* v. *London & Provincial Supply Association, Ld.* (1) it was held that a "person" meant a person skilled in matters pharmaceutical, and not an impersonal corporate body which would know nothing about that particular business. Similar decisions were given on the interpretation of the word "person" in the Dentists Act, 1878, and the Veterinary Surgeons Act, 1881, on the ground that in those Acts a "contrary intention" appeared, and that there was something which excluded the impersonal and directed attention to the personal.

Is there anything in s. 46 of the Solicitors Act, 1932, which should lead the Court to a like conclusion ? In my opinion, there is. Mark the words in the section, "not having in force a practising certificate," the possession of which is one of the things necessary to qualification to act as a solicitor under s. 43 of the Act. Refer back to s. 3. It is abundantly clear that a corporate body is not and never has been regarded as being capable of possessing a practising certificate or of being admitted as a solicitor. I think, therefore, that s. 46 refers, not to a body corporate, but to a person who is capable of being admitted to the ranks of solicitors by the Master of the Rolls under s. 3 and of acting as a solicitor if he takes out a practising certificate.

That further difficulties would arise if Mr. Burrows's argument is correct becomes apparent when one comes to examine s. 51, where it is enacted that, if an unqualified person employs, or acts under cover of, a qualified solicitor who allows that unqualified person to represent him as his agent in any action or in any matter in bankruptcy, the unqualified person, as well as the solicitor, is made liable to penalties. If I am right in the conclusion that a body corporate cannot possess a practising certificate, the only way in which it could enter the lists of legal disputes would be by employing a solicitor, and the corporate body so employing a solicitor as agent—at the solicitor's own risk of being struck off the Roll—would be subject to penalties one of which would be imprisonment for a term not exceeding one year, and one cannot imprison a body corporate. Mr. Burrows says that that is not final. Adhering to his submission that in s. 46 " person " includes a body corporate as well as a natural person, he says that the Legislature have not noticed that inconsistency. He agrees that a corporation cannot be sent to prison and that the result would be a strange one, because a body corporate would then be put in a better position than any one else.

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(1) 5 App. Cas. 857.

It may be that this is casus omissus and that Parliament did not envisage a body corporate assuming to act as a solicitor. It is curious, if there is real importance in this matter, that the meaning of the word " person " in the Act of 1932, which is contained in a mere re-enactment of s. 12 of the Attorneys and Solicitors Act, 1874, has never been brought to the test of the Courts, as it has under the other Acts to which we have been referred. The answer may be that the public is amply protected by the power of the Attorney-General to take action to obtain an injunction against persons who, not being solicitors, are deceiving and misleading the public by pretending that they are that which they are not. That course has been adopted on several occasions. The Attorney-General has intervened and the Court has granted an injunction restraining a body corporate from pretending to act in a way in which it could not lawfully act.

That may be the explanation. However that may be, in my opinion the magistrate was quite right in the conclusion to which he came that the word " person " in s. 46 connotes a natural person, and does not include an artificial person, and he, therefore, acted properly in dismissing these informations.

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LAWRENCE J. I agree. In my view the words "unqualified person" in ss. 43 and 51 of the Solicitors Act, 1932, must be given the same meaning, and when it appears that the words in s. 51 cannot refer to a corporate body it follows that they cannot refer to a corporate body in s. 43. When it is borne in mind that the words "unqualified person" are only a short phrase to denote a person who is not in possession of a practising certificate and that s. 46 contains the words "any person not having in force a practising certificate," it becomes clear that s. 46 does not apply to a corporate body.

The only thing I wish to add is that I am not satisfied that the mischief which it is suggested has been overlooked by the Legislature is as great as has been urged. It seems to me that a company could not be formed legally to carry on a solicitor's business or to derive profits from one, and that any attempt to do so, whether by the means described in s. 51 or otherwise, could properly be restrained at the suit of the Attorney-General. It is not, however, necessary to decide that, as I agree that the appeal must be dismissed for the reasons given.

*Appeal dismissed.*

Solicitors for appellants: *C. O. Humphreys & Son.*
Solicitors for respondents: *W. G. Street & Co.*

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## THE KING *v.* HARE.

*Criminal Law—Indecent Assault on boy—Charge against a woman—Conviction upheld—Offences against the Person Act,* 1861 (24 & 25 *Vict.* c. 100), *ss.* 52, 62.

By s. 62 of the Offences against the Person Act, 1861: "Whosoever . . . . shall be guilty . . . . of any indecent assault upon any male person shall be guilty of a misdemeanour":—

*Held,* that a woman can be convicted of an indecent assault on a boy under that section.

*Semble,* a woman can be convicted of an indecent assault on another female, under s. 52 of the same Act.

Observations on the effect of headings and marginal notes to Acts of Parliament.

Appeal against conviction.

The appellant, Maggie Hare, was convicted at the Central Criminal Court on October 20, 1933, on three counts of an indictment which charged her with indecent assault on a boy of the age of twelve years and was sentenced to fourteen months' imprisonment in the Second Division.

Counsel for the appellant moved at the trial that the indictment could not lie because in law a woman could not be guilty of the offences charged. The Recorder overruled the motion, and said: "This section (s. 62) of the Offences against the Person Act, 1861, says: 'Whosoever . . . . shall be guilty . . . . of any indecent assault upon any male person,' and I am going to construe the word 'whosoever' as meaning what it obviously does mean, male or female, and therefore the motion to quash is overruled."

The evidence was that the appellant had instigated and induced the boy to have connection with her on three occasions. Subsequently the boy was taken to hospital, and a medical examination revealed that he had been infected with a venereal disease. There was evidence that this disease had been communicated to him by the appellant. The boy's father, having ascertained the facts, accused the appellant, who at first remained silent, but when the accusation was repeated, the appellant admitted that the boy had had connection with her three times.

*Venetia Stephenson* for the appellant. The appellant has done nothing which would bring her within the ambit of s. 62 of the Offences against the Person Act, 1861. The offence under s. 62 is restricted by the heading of the group of sections beginning with s. 61 to unnatural offences, or offences of a sodomitical character. The expression "any indecent assault" is ambiguous and should be interpreted in the light of the heading "unnatural offences." If such an interpretation is right, the offence under s. 62 cannot be committed by a woman.

*Eustace Fulton*, for the Crown, was not called on.

The judgment of the Court (LORD HEWART C.J., AVORY and LAWRENCE JJ.) was delivered by

AVORY J., who stated the facts and said: We are asked in this case to hold that it was not competent to the Recorder to leave the case to the jury or for the jury to convict the appellant. The argument put forward on behalf of the appellant is that the charge being laid under s. 62 of the Offences against the Person Act, 1861, no woman can be convicted of the offences charged. The boy, being under the age of sixteen, was by law incompetent to consent to any such conduct as took place between him and the appellant. There is no question that the nature of that which took place between them was indecent. The whole question is, as has been concisely put by counsel for the appellant, whether the offence under s. 62 is to be limited to an indecent assault of a sodomitical character. Some reliance was placed by the appellant on the heading of ss. 61 to 63—namely, "Unnatural Offences." Sect. 61 and the first part of s. 62 deal with unnatural offences—namely, bestiality or acts of a sodomitical character, but s. 62 proceeds: "Whosoever . . . . shall be guilty . . . . of any indecent assault upon any male person. . . . ." The question is whether there is any ground for limiting those words in the manner suggested. Headings of sections and marginal notes form no part of a statute. They are not voted on or passed by Parliament, but are inserted after the Bill has become law. Headnotes cannot control the

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plain meaning of the words of the enactment, though they may, in some cases, be looked at in the light of preambles if there is any ambiguity in the meaning of the sections on which they can throw light. There is no ambiguity in s. 62. Having regard to the fact that the word "Whosoever" in s. 61 admittedly includes a woman and that the first part of s. 62 admittedly includes a woman, there is no reason for saying that the phrase: "Whosoever . . . . shall be guilty . . . . of any indecent assault," does not include a woman. Reference has been made to many other sections in the Act of 1861, in which the word "whosoever" is used. There is no doubt, in our opinion, that in s. 52 of the Act the word "Whosoever" includes a woman, and there is no reason for saying that a woman cannot be guilty of an indecent assault on another female. In the result, we think the point has no substance. The appellant was properly convicted and the appeal must be dismissed.

*Appeal dismissed.*

Solicitor for the appellant: *The Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *The Director of Public Prosecutions.*

T. W. M.

# ROSSI *v.* BLUNDEN.

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Dec. 20, 21.

*Revenue—Income Tax—Allowances—Married Man—Death of Wife during Year of Assessment—Female Relative taking charge of Widower's Child—Right of Widower to Allowances in respect of both Wife and female Relative—Finance Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *ss.* 18, 19.

The wife of the appellant died in October, 1932, leaving him a widower with one child. Thereupon, a female relative of the appellant resided with him to have the charge and care of the child. For the year of assessment to income tax 1932–33 the appellant received the personal allowance as a married man under s. 18 of the Finance Act, 1920, in the assessment made on him under Sch. D of the Income Tax Act, 1918:—

*Held*, that the appellant was not also entitled to an allowance under s. 19 of the Finance Act, 1920, in respect of the female relative in the year 1932–33, the correct way to interpret ss. 18 and 19 being to regard them as mutually exclusive in their application to any one year of assessment.

Case stated by General Commissioners of Income Tax.

At a meeting of the Commissioners for the general purposes of the income tax acting in and for the division of Norwich City, held on April 7, 1933, the appellant, Cyril Philip Rossi, partner in the firm of Crook & Rossi, chartered accountants, claimed for the year 1932–33 an allowance of 50*l.* for a housekeeper under s. 19 of the Finance Act, 1920, as amended by the Finance Act, 1924, ss. 21 and 22, and the Finance (No. 2) Act, 1931, s. 8 and Sch. IV. (1)

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(1) By Finance Act, 1920, s. 18: "The claimant, if he proves that for the year of assessment he has his wife living with him, or that his wife is wholly maintained by him during the year of assessment . . . . shall be entitled to a deduction of two hundred and twenty-five pounds . . . ."

The amount of the deduction was reduced to 150*l.* by the Finance (No. 2) Act, 1931, s. 8 and Sch. IV.

By Finance Act, 1920, s. 19, as re-enacted by the Finance Act, 1924, s. 22: "If the claimant proves that he is a widower and that for the year of assessment a person, being a female relative of his or of his deceased wife, is resident with him for the purpose of having the charge and care of any child of his . . . . he shall, subject as hereinafter provided, be entitled to a deduction of forty-five pounds in respect of that female relative . . . . Provided that—(*c*) not more than one deduction . . . . shall be allowed to any claimant under this section in any year."

The amount of the deduction was increased to 60*l.* by s. 21 of the Finance Act, 1924, and was reduced from that figure to 50*l.* by the Finance (No. 2) Act, 1931, s. 8 and Sch. IV.

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The following facts were admitted :—

The wife of the appellant died on October 29, 1932, when the appellant became a widower. The wife of the appellant, at her death, left the appellant with one child. After the death of the wife of the appellant a spinster sister of the appellant resided with the appellant for the purpose of having the charge and care of his child. For the year of assessment 1932–33 the appellant received the personal allowance of 150*l.* as a married man under s. 18 of the Finance Act, 1920, as amended by the Finance (No. 2) Act, 1931, s. 8 and Sch. IV. (1), in the assessment made on him in the partnership name under Sch. D of the Income Tax Act, 1918.

It was contended by the appellant that the fact that he had received the personal allowance as a married man under s. 18 of the Finance Act, 1920 (as amended) (1), did not preclude a claim by him to housekeeper allowance for the same year under s. 19 of the Finance Act, 1920 (as amended). (1)

It was contended on behalf of the Crown that the appellant was not entitled to the further allowance of 50*l.* which he claimed.

The Commissioners held on the facts admitted that the appellant, having received personal allowance under s. 18 of the Finance Act, 1920 (as amended), he was not entitled to housekeeper allowance under s. 19 of the said Act (as amended).

The appellant appealed.

*T. N. Donovan* for appellant.

*Sir Donald Somervell S.-G.* and *R. P. Hills* for the Crown.

Finlay J. This case raises an interesting point, but I entertain no doubt that the conclusion arrived at by the Commissioners is correct.

The substance of the relevant enactments is quite clear. By s. 18 of the Finance Act, 1920 (as amended), if a man is married and his wife is living with him, or if they are not living together but the husband is supporting the wife, the husband is entitled to a personal allowance of 150*l.* By s. 19 of the Act of 1920 (as amended) a widower is given an allowance of 50*l.* in

(1) See note (1) ante, p. 357.

respect of a female relative or other person residing with him and having the charge and care of his child. Sect. 19 as re-enacted by s. 22 of the Finance Act, 1924, contains the express provision that not more than one deduction shall be allowed to any claimant under the section in respect of any one year. It is, therefore, quite plain that, if a person has one female relative residing with him for a purpose specified in the section for the first six months of the year and another for the second six months, he can only obtain an allowance in respect of one of those persons. Obviously, the Legislature in passing the section contemplated that during the whole of the year of assessment the claimant, if a married man, would have his wife living with him or supported by him, or, if a widower, would have a female relative living with him to look after his children or his home, and fixed an appropriate allowance in each case for the whole year of assessment.

It is contended that, if at one time in the year of assessment a man has his wife living with him, or supported by him, and at another time in that year he has a female relative living with him for the purposes defined in s. 19, he is entitled to get two allowances, one in respect of the wife and one in respect of the female relative, although he could not get two allowances in respect of two female relatives. In my opinion, that is wrong on the simple ground that the proper way to construe ss. 18 and 19 is to treat them as mutually exclusive. One section deals with married men and the other with widowers, and no man, for the purpose of those sections and of assessment in one year of assessment, can be at once a married man and a widower. That seems to me to be in accordance with the obvious intention of the Act and with the principles of sound construction.

I think, therefore, that there is no ground for the contentions advanced on behalf of the appellant and that this appeal fails.

*Appeal dismissed.*

Solicitors for appellant: *Sharpe, Pritchard & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

G. F. L. B.

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*Oct.* 24.

## LONDON COUNTY COUNCIL *v.* MONTAGUE BURTON, LIMITED.

*Acquisition of Land—Compulsory Powers of Purchase—Notice to treat—Withdrawal—Compensation—" Expenses . . . . reasonably incurred . . . . by reason or in consequence of the service of the notice to treat "—Ground Rent and Interest on purchase price of premises — Claim for proportionate part during currency of Notice to treat—Acquisition of Land (Assessment of Compensation) Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 5, *sub-s.* 2—*National Economy (Road Services) Order,* 1931 (*S. R. & O.,* 1931, *No.* 817), *cl.* 2, *sub-cl.* 1.

On the withdrawal by a county council of a notice to treat in respect of certain premises the respondents became entitled to compensation " equal to the amount of any expenses . . . . reasonably incurred by [them] by reason or in consequence of the service of the notice to treat."

Before the date of such service the respondents had become lessees of the premises at a ground rent, and had also borrowed money wherewith to purchase the lease. They claimed as such " expenses " a proportionate part of the ground rent and of the interest on the said borrowed money for the period of the currency of the said notice:

*Held,* that these payments were not expenses " incurred . . . . by reason or in consequence of the service of the notice to treat " but by reason of antecedent contractual liability, and were not, therefore, the subject-matter for compensation.

SPECIAL CASE stated by an arbitrator.

On July 24, 1931, the London County Council (called herein " the Council ") gave to the claimants, Montague Burton, Ld. (called herein " the company "), under the London County Council (Improvements) Act, 1930 (21 Geo. 5, c. vi.) notice to treat in respect of certain premises, 67 and 68 London Road, and 2, 4, 6, 8 and 10 St. George's Road, Southwark, of which the company were lessees for 999 years at ground rents. On October 7, 1931, the company gave notice to the Council of a claim for compensation in respect of these premises pursuant to s. 5, sub-s. 2, of the Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57). On December 3, 1931, the Council gave notice to the company that in consequence and in pursuance of the provisions of the National Economy Act, 1931 (21 & 22 Geo. 5, c. 48) and the National Economy (Road Services) Order, 1931 (S. R. & O. 1931, No. 817) (under which the

Minister of Transport had given notice to the Council that he would withhold payments to them out of the Road Fund —see cl. 1 of the said Order), they withdrew the above notice to treat. By virtue of cl. 2, sub-cl. 1, of the National Economy (Road Services) Order, 1931, the Council then became liable to pay to the company "compensation equal to the amount of any expenses which [the company] proves to have been reasonably incurred by [them] by reason or in consequence of the service of the notice to treat." The company claimed (inter alia), firstly, ground rents payable in respect of the above premises (under various leases bearing dates previous to the date of the service of the notice to treat, July 24, 1931) from the latter date to September 29, 1931, at the rate of 735*l.* per annum, and from September 29, 1931, to January 3, 1932 (being a date one month after reception of the notice of withdrawal of the notice to treat, this being a reasonable period in view of the possibility of another notice to treat and of the provisions of sec. 13, sub-s. 3, of the above Act of 1930), at the rate of 885*l.* per annum, and, secondly, interest at the rate of 7 per cent. per annum from the said date of the service of the notice to treat until the said January 3, 1932, payable by the company upon a sum of 23,100*l.*, being money borrowed before the said date of the service of the notice to treat for the purpose of being paid as consideration upon the acquisition by the company of the above leaseholds. As the parties could not agree as to the right to and amount of compensation in respect of these claims, the matter, under s. 1, sub-s. 1, of the Act of 1919, was referred to an official arbitrator.

The arbitrator stated this case in the form of an alternative award, both as to claim and costs.

*Trustram Eve* for the company. During the period between the service of the notice to treat and January 3, 1932, the notice imposed on the company the dead hand and rendered the payments of ground rent and interest a loss. The words of cl. 2, sub-cl. 1, of the Order in Council should be construed

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in accordance with the canon laid down by Lord Atkinson in *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co.* (1), which is, that an intention to take away the property of a subject without compensation ought not to be imputed to the Legislature unless that intention be expressed in unequivocal terms: see also *Attorney-General* v. *Horner* (2); *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.* (3); and *Public Works Commissioner* (*Cape Colony*) v. *Logan.* (4) Both the ground rent and interest were clearly expenses, and the test whether they were expenses within cl. 2, sub-cl. 1, of the Order, is whether those sums, by reason of the giving of the notice to treat, became wasted sums of money.

[Lord Hewart C.J. Did the notice cause the money to be wasted, or to be paid ?]

It was wasteful expenditure. A parallel case to the present one would be where the company had a lease at a rent and an opportunity of sub-letting at a profit rent. The notice to treat would prevent the sub-letting, so that the rent payable by the company would have no counterbalance. It could not be said that in that case they would not be entitled to compensation.

*H. G. Robertson* for the Council. The canon of construction laid down in the *Cannon Brewery* case (1) does not apply, because this is not a case of taking away a right of property but of conferring a right to compensation. These payments were expenses, but they were not incurred in consequence of the notice to treat, but because the company had contracted to pay them, the contracts in both cases being made before the service of the notice to treat. The Council did not withdraw the notice to treat under s. 5, sub-s. 2, of the Act of 1919, because at the time the Minister gave notice that he was withholding the payment out of the Road Fund the six weeks' limit for withdrawing the notice to treat fixed by the sub-section had expired.

Lord Hewart C.J. This is a special case under the

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(1) [1919] A. C. 744, 752.

(2) (1884) 14 Q. B. D. 245, 257.

(3) (1882) 7 App. Cas. 178, 188.

(4) [1903] A. C. 355, 363.

Acquisition of Land (Assessment of Compensation) Act, 1919, and it appears to me that the argument which has been put forward by Mr. Robertson is the right argument. In other words, the National Economy (Road Services) Order, 1931, has strictly limited that for which compensation is to be paid; by cl. 2, sub-cl. 1, it is to be "compensation equal to the amount of any expenses" which the claimant "proves to have been reasonably incurred by him by reason or in consequence of the service of the notice to treat." In my opinion, with regard to both of these claims, it is true to say that they have not been expenses incurred by reason of or in consequence of the service of the notice to treat. I think therefore that the two questions asked by the arbitrator ought to be answered in that sense—namely, that the Council is not liable to pay to the company the sums claimed; and that being so the direction of the award with regard to costs follows.

AVORY J. I am of the same opinion—namely, that neither of these items can properly be said to be included in the express words of cl. 2, sub-cl. 1, of the Order in Council, as being expenses which have been reasonably incurred by reason or in consequence of the service of the notice to treat. In this case it appears to me that the principle which is relied upon by Mr. Trustram Eve, starting with the case of *Attorney-General* v. *Horner* (1) and followed by such cases as *Public Works Commissioner* v. *Logan* (2) and other authorities, has no application here, because we have in this Order in Council, which is to be construed as a statute, unequivocal terms limiting the amount of compensation which is to be paid under the circumstances of a notice to treat having been withdrawn. In the case of *Public Works Commissioner* v. *Logan* (2), for instance, the expression used in the judgment of the Privy Council in that case is (3): "Their Lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation." Now

(1) (1884) 14 Q. B. D. 245, 257.
(2) [1903] A. C. 355, 363.
(3) [1903] A. C. 363.

this is not a case where property is being taken away without any compensation. It is a case in which the Legislature is expressly enacting the amount of compensation which is to be paid under certain circumstances. The judgment in that case went on to say: "Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms." In my opinion there is here an expression in unequivocal terms limiting the amount of compensation, which cannot properly be said to include, as Mr. Trustram Eve's argument invites us to include, loss which has been incurred by the claimant in consequence of the notice to treat and the withdrawal of that notice. It is also I think significant to point out that the Acquisition of Land (Assessment of Compensation) Act, 1919, which gave to the London County Council in this case the option to withdraw the notice to treat within six weeks after the notice of claim was received, and which, as has been pointed out by Mr. Robertson, could not in this case have been acted upon by the London County Council, expressly provides in s. 5, sub-s. 2, that in such cases where they withdraw the notice to treat, they shall be liable to pay compensation to the claimant "for any loss or expenses occasioned by the notice to treat having been given to him and withdrawn." But cl. 2, sub-cl. 1, of the National Economy (Road Services) Order, 1931, omits altogether the word "loss" and limits the compensation to expenses which have been incurred in consequence of the service of the notice to treat. I agree, therefore, that the appellants here, the claimants, are not entitled to either of the items claimed.

LAWRENCE J. I am of the same opinion. I do not think that an expense can be said to be reasonably incurred by reason of or in consequence of the notice to treat when in fact it has been incurred before the notice to treat. Here the rent was agreed by a lease signed before the notice to treat, and the capital sum of 23,100*l.* was spent before the notice to treat. If there had been an option to continue or determine the lease, it might have been said that the rent to be paid after the notice to treat was incurred in consequence of the notice to treat; but as I understand it, there was no option to determine the lease; and with reference to the 23,100*l.*, that had already been expended and could not, in my view, therefore have been expended by reason of or in consequence of the notice to treat; in fact it could have been paid off at the notice to treat. It seems to me that the words "reasonably incurred" in the Order also suggest the same view, and indicate that the expenses referred to are expenses with reference to which the owner had to exercise his judgment at the time of the notice to treat. I also agree with what my brother Avory has said about the contrast between the words of the Order and those in the Act of 1919. With regard to the rule of construction, in my opinion that rule has no application where the owner is not deprived of his property without compensation but is given a certain measure of compensation.

Solicitors for company: *Lewin, Gregory, Torr, Durnford & Co.*

Solicitor for Council: *Solicitor to London County Council.*

W. L. L. B.

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June 30.

## SPRECKLEY *v.* LEICESTERSHIRE COUNTY COUNCIL.

*Landlord and Tenant—Agricultural Holding—Notice to quit—Compensation for Disturbance—Claim by Tenant—Particulars of claim—Sufficiency—Agricultural Holdings Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 12, *sub-s.* 6; *s.* 16.

The Agricultural Holdings Act, 1923, s. 16, sub-s. 1, provides that "any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act . . . . shall be determined . . . . by a single arbitrator in accordance with the provisions set out in the Second Schedule to this Act." Sect. 12, sub-s. 1, gives the right to claim compensation for disturbance on quitting the holding and sub-s. 6 provides that compensation for loss directly attributable to quitting a holding unavoidably incurred upon the sale or removal of household goods, implements of husbandry, fixtures and farm produce must be computed at an amount equal to one year's rent unless it is proved that the loss exceeds the amount of one year's rent. Sect. 16, sub-s. 2, provides that "any such claim as is mentioned in this section shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the . . . . tenant to the landlord . . . . before the expiration of that period."

On March 19, 1931, the tenant of an agricultural holding was served by his landlord with a notice to quit expiring on April 6, 1932. On November 23, 1931, during the currency of the notice to quit the tenant gave notice to his landlord of his intention to make a claim for compensation for disturbance under s. 12 of the Act, "for loss or expense directly attributable to my quitting the holding which I may unavoidably incur upon or in connection with the sale or removal of my household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connection with the holding, including any expenses reasonably incurred by me in my claim for compensation." On April 6, 1932, the tenant quitted the holding. On May 21, 1932, he gave notice under s. 16, sub-s. 2, of the Act, that the amount of his claim for disturbance was "one year's rent, viz.: Two hundred and twenty-five pounds (225*l.*)." The county court judge held that the particulars were sufficient.

*Held* (reversing the decision of the county court judge), that no sufficient particulars had been delivered and therefore that the claim was barred, on the grounds: (1.) that the notice of November 23, 1931, was merely a notice that a claim would be made and not a rendering of particulars, and (2.) that the notice of May 21, 1932, although it quantified the claim at the minimum sum to which the tenant was entitled under s. 12, sub-s. 6, of the Act, did not furnish particulars of some loss or expense to which the tenant had been put.

*In re O'Connor and Brewin's Arbitration* [1933] 1 K. B. 20 applied.

APPEAL from a decision of the judge of the Melton Mowbray county court on a special case stated by Mr. Percy Toone the arbitrator appointed in these proceedings, for the opinion of the Court under the Agricultural Holdings Act, 1923.

The case set out the following facts :—

1. The tenant held of John Longwill, the landlords' predecessor in title, a certain farm and premises known as Sandy Lane Farm, situate in the parish of Burton Lazars in the county of Leicester, on a yearly tenancy. The rent payable in respect of the farm was 225*l.* per annum. There was no written tenancy agreement.

2. On March 19, 1931, the landlords' predecessor in title served on the tenant by registered post a notice to quit, determining the tenancy on April 6, 1932.

3. On November 23, 1931, the tenant gave a notice in writing to his landlords of his intention to make a claim for compensation for disturbance under s. 12 of the Agricultural Holdings Act, 1923, which was in the following terms :—

" *Agricultural Holdings Acts,* 1908 *to* 1923.

" *Notice of Claim to Compensation for Disturbance.*

To the Trustees of the late Mr. J. Longwill,
Pickwell, Melton Mowbray.

You having terminated my tenancy by notice to quit, I *hereby give you notice* that I claim under and in accordance with section 12 of the Agricultural Holdings Act, 1923, to be paid on the determination of my tenancy of the holding situate in the parish of Burton Lazars in the county of Leicester, the additional compensation for the loss or expense directly attributable to my quitting the holding which I may unavoidably incur upon or in connection with the sale or removal of my household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connection with the holding, and including any expenses reasonably incurred by me in the preparation of my claim for compensation.

You are at liberty at any time to make a valuation of the goods, implements, fixtures, produce and stock which are intended to be sold by me.

*And further take notice* that I intend to claim and do claim compensation under the above-named Acts, under the existing

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contract of tenancy (if any) of such holding, or under any custom or otherwise, on my quitting your holding.

Dated this 23rd day of November, 1931.

| | |
|---|---|
| Messrs. Walker, Walton & Hanson,<br>Exchange Walk, Nottingham,<br>will value for me. | Walker, Walton & Hanson,<br>Agents for and on behalf<br>of Mr. R. Spreckley." |

4. The tenant quitted the farm on or about April 6, 1932.

5. By his will dated November 29, 1930, and proved in the Leicester District Probate Registry on January 13, 1932, the said John Longwill, who died on July 6, 1931, devised to the landlords the said property known as Sandy Lane Farm, upon the trusts therein mentioned and under which the landlords were the estate owners in fee simple.

6. On May 21, 1932, Messrs. Walker, Walton & Hanson, of Exchange Walk, Nottingham, the valuers acting on behalf of tenant, gave to Messrs. Whittle, Attenborough & Co., the valuers acting on behalf of the landlords, notice that the tenant's claim for compensation for disturbance was one year's rent, namely, 225*l*. The notice was as follows :—

" *Registered.*

Dear Sirs,

*Spreckley to Longwill's Exors.*
*or Leicester County Council,*
*Burton Lazars.*

In order to comply with section 16, sub-section 2, of the Agricultural Holdings Act, 1923, we hereby give you notice that the amount of our client's claim for disturbance is one year's rent, viz. : Two hundred and twenty-five pounds (225*l*.).

Yours faithfully,
Walker, Walton & Hanson.

Messrs. Whittle, Attenborough & Co.,
Winchester House,
Newark Street,
Leicester."

7. By an appointment in writing Mr. Percy Toone was appointed as single arbitrator under the provisions of the Agricultural Holdings Act, 1923, to ascertain, determine and

award the amount to be paid under the said Act or otherwise as between the landlords and the tenant in respect of the said farm.

8. At the hearing of the arbitration on September 16, 1932, it was proved to the arbitrator's satisfaction that the tenant had incurred expense directly attributable to his quitting of the holding within the meaning of s. 12, sub-s. 6, of the Agricultural Holdings Act, 1923. It was, however, contended on behalf of the landlords that the true construction of s. 16, sub-s. 2, of the Act of 1923 was that particulars of such expense should have been given to the landlords within two months after the date of the expiration of the tenancy, and that as the notice referred to in para. 6 did not furnish these particulars it was not a sufficient compliance with s. 16, sub-s. 2, of the Act and that the arbitrator was not then entitled to receive any evidence of such loss.

9. It was contended on behalf of the tenant that as he was only claiming the minimum to which he was entitled under s. 12, sub-s. 6, of the Act, namely, one year's rent, it was not necessary nor was it the custom to give to the landlords particulars of the loss or expense incurred by him and that the notice contained sufficient particulars of the tenant's claim to comply with the said section.

The question of law submitted for the opinion of the Court was whether the notice set out in para. 6 of the case was, under the circumstances, a sufficient compliance with s. 16, sub-s. 2, of the Agricultural Holdings Act, 1923.

The county court judge answered the question in favour of the tenant. In his considered judgment, after referring to the facts and the authorities cited, he concluded as follows: "With the assistance of the authorities to which I have referred my conclusions would be these: (1.) There is nothing in s. 16, sub-s. 2, which prevents the tenant from giving particulars of his claim at any time between the date of the notice to quit and the two months after the termination of the tenancy. A tenant in occupation of a farm and premises knows that he must incur some loss or expense in moving, though he could not quantify it (which he is under no obligation to do) until he left. In *In re O'Connor and Brewin's Arbitration* (1) the Master of the Rolls points out that the tenant has fourteen months in which to make up his mind. As soon as he has made up his mind he may as well say so at once. Mr. Done, for the landlords, seemed to be under the impression that the particulars of the claim could only be given between the date of the termination of the tenancy and two months thereafter. I do not agree with this. In any case, I decide that if any particulars were necessary beyond the claim to one year's rent they were given in the notice of November 23, 1931.

(2.) Subject to the effect of the decision in *In re O'Connor and Brewin's Arbitration* (1) I should adopt the opinion of Lord Anderson in *M'Harg* v. *Speirs* (2) to which I have already made reference, and hold that a claim to one year's rent under the first branch of s. 12, sub-s. 6, is the claim referred to in s. 16, sub-s. 2, and is its own particulars. Short of the situation that arose in *Minister of Agriculture and Fisheries* v. *Dean* (3) I do not see how a landlord could ever defeat this claim by showing that the tenant incurred no relevant loss or expense at all. It would seem to me a strict construction of the penal provisions of s. 16, sub-s. 2, to hold that a tenant who contents himself with a claim to the conventional sum fixed for the 'avoidance of disputes' should automatically extinguish it.

(3.) I do not think that there is anything in the actual decision in *O'Connor and Brewin's* case (1) which governs the case before me. The tenant's claim was simply 'disturbance —two years' rent, 514*l.*' That is a class claim only. He thus deliberately committed himself to a claim under the second branch of s. 12, sub-s. 6, of the Act of 1923, under which his claim would be exactly the amount he could prove, subject to the limit of two years' rent. In his notice of intention to claim, such as it was, all that he had said was that he was going to claim compensation for disturbance. He indicated no head of relevant loss or expense under which

(1) [1933] 1 K. B. 20, 30.
(2) 1924 S. C. 272, 277.
(3) [1924] 1 K. B. 851.

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he was going to substantiate his claim. The decision of the Court of Appeal was that he had given no sufficient particulars. He had given none at all.

There was a secondary claim, viz.: that the tenant was entitled to claim at least one year's rent. This claim was not made until two months after the determination of the tenancy. It was first heard of during the arbitration. As the claim had not been made in due time, it could not be said that due particulars had been given of it. This was enough to dispose of that claim. The Master of the Rolls expressed his agreement with *M'Harg* v. *Speirs* (1), but otherwise did not refer to this secondary claim, except to say that the point raised in connection with it lay outside the question which the Court had to determine.

It is for this reason that I feel at liberty to refer to the difference between the view of Lord Anderson in *M'Harg* v. *Speirs* (1) under a claim for one year's rent and that expressed by Slesser L.J. and Romer L.J. to the effect that it makes no difference whether a claim be for one year's rent or more. The attention of these learned judges does not seem to have been called to the fundamental difference between the two claims. With regard to the former, one year's rent is the conventional claim, the proof in support of it being trivial. With regard to the latter, the tenant must allege and prove the whole of his loss in detail.

I express my opinion with great diffidence, but I must answer the question put to me in favour of the tenant.

Each side agrees that this case is one of great importance. In my discretion I direct that the landlords should pay costs on Scale C."

*Montgomery K.C.* and *Trustram Eve* for the landlords. The question on this appeal is whether a notice of claim under the Agricultural Holdings Act, 1923, is sufficient in which the tenant gives no particulars as required by the Act. The case it is submitted is entirely governed by the recent decision in this Court of *In re O'Connor and Brewin's*

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(1) 1924 S. C. 272, 277.

*Arbitration.* (1) The county court judge has sought to draw distinctions between that case and the present. The question turns on the construction of s. 12, sub-ss. 6 and 7, and s. 16, sub-ss. 1 and 2, of the Act of 1923.

[LAWRENCE L.J. What is the object of giving particulars further than those in s. 12 unless a claim is going to be made for more than one year's rent ?]

It has been decided that the tenant must prove some loss before he can claim compensation, that once he has proved some loss, then the amount is quantified by one year's rent.

The particulars must be of the loss or expense incurred and the landlord is entitled to know what case the tenant is to make, so as to be able to produce any necessary evidence. For example, the claim might be in respect of loss on the value of implements, etc., but it might be possible to prove that although a loss was claimed, the implements, etc., might have been sold at a profit.

[LAWRENCE L.J. Under s. 12, sub-s. 7 (*b*), the tenant has to give a notice of intention to claim, as one of the conditions on which he can claim.]

That is so, and under s. 16, sub-s. 2, he has to give particulars of the claim.

[They were stopped.]

*Somervell K.C.* and *G. C. Allsebrook* for the respondent. The word " particulars " in s. 16, sub-s. 2, must be construed according to the content in which it is found. If the tenant is asking for a definite sum, say 500*l.*, detailed items making up that sum must be set down. Here the context is nothing like that ; it is a mere claim in the most general terms. In *Jones* v. *Evans* (2) there was no money quantification of the claim and it was held that the particulars were sufficient.

Under s. 12, sub-s. 6, if the tenant alleges disturbance and restricts his claim to the standard one year's rent of the holding he has fully set out the nature of his claim. It is only necessary for him to prove some loss and he is then entitled to one year's rent.

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(1) [1933] 1 K. B. 20.

(2) [1923] 1 K. B. 12.

*Minister of Agriculture and Fisheries* v. *Dean* (1) was a very peculiar case. The Ministry of Agriculture were the landlords and they had a number of sub-tenancies which automatically came to an end, the sub-tenants having no right of action against the Ministry when the Ministry's tenancy was terminated, so that the sub-tenants were really cultivating without any right such as is given under this Act to claim compensation. It was there laid down that the effect of s. 10, sub-s. 6, of the Act of 1920, was that as a condition precedent to his right to compensation for disturbance a tenant must prove that he has incurred some loss or some expense of the kind indicated in the sub-section; that on proof of that he is entitled as a minimum to one year's rent of the holding, but that unless he proves some loss or some expense of the kind indicated he does not bring himself within sub-s. 6 and is not entitled to compensation. See also *Montrose* (*Duke of*) v. *Hart* (2), *M'Harg* v. *Speirs*. (3)

That was the state of the law before *O'Connor and Brewin's* case. (4) That case, it is submitted, decides that where a tenant sets out to prove his loss and expense as exceeding one year's rent he must give particulars not of the quantities, but of the items of loss and expense.

*O'Connor and Brewin's* case (4) it is submitted must be confined to the actual subject-matter there, where the form of the particulars shows that loss and expense were being claimed as such, and that being the case, they must be itemised. This is a case where the standard year's rent only is being claimed, where, in the words of the Act, a computed sum of loss and expense is being claimed and where, under *Minister of Agriculture and Fisheries* v. *Dean* (1), if you can show that you have suffered any loss—that you were disturbed—you get your year's rent. The Ministry of Agriculture were not in the least disturbed by the words used in the Act. They sat in London; they ceased to get their rents from their sub-tenants, but there was no disturbance. The word means that the man has to sell his stock, implements, etc., and to move his furniture. If a man is disturbed, then he plainly suffers loss and expense.

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(1) [1924] 1 K. B. 851, 854, 856.
(2) 1925 S. C. 160.
(3) 1924 S. C. 272.
(4) [1933] 1 K. B. 20.

Finally, the only possible construction is that the class of claim considered here is one where the actual items have no relevance to the sum claimed. When the landlords receive the notice they have full notice as to the nature of the claim and know quite well there is only one way in which they can defeat that claim and that is by showing, in effect, that there has been no disturbance and no loss or expense incurred.

LORD HANWORTH M.R. This appeal must be allowed. The county court judge has permitted himself to enter into a discussion as to what he thinks would be a reasonable course to adopt. What the Court has to do is to interpret the words of the Act of Parliament simpliciter, without concerning itself whether it agrees with it or not.

The object of the Agricultural Holdings Acts was to alter the rights of landlords and tenants under agreements made between them in respect of agricultural holdings, and to that extent the Acts were an invasion of the ordinary rights of agreement. It would be quite wrong to suppose that the Court has only to consider the rights of tenants as against landlords. The landlords have rights which must be considered. I think these observations are relevant because the county court judge has discussed at large what he thinks ought to be their relation.

We have to consider two sections of the Agricultural Holdings Act, 1923. Those sections are s. 12 and s. 16, and, as I shall refer to one or two cases decided before that Act, it is important to remember that s. 12 has replaced what was s. 10 of the Act of 1920, and s. 16 has replaced s. 18 of the same Act, and that for all relevant purposes it may be said that these sections in the Acts of 1920 and 1923 are the same.

Sect. 16 of the Act of 1923 provides by sub-s. 1 that questions between landlord and tenant in regard to compensation shall be determined by a single arbitrator. Then by sub-s. 2 it is provided: "Any such claim as is mentioned in this section shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the landlord to the tenant or by the tenant to the landlord, as the case may be, before the expiration of that period." In simpler words, the Act provides that, instead of a more cumbrous mode of arbitration, all questions and differences are swept into the system which is laid down by s. 16. It also provides that any claim thus made, whether by landlord against tenant or by tenant against landlord, are to be subject to the procedure laid down in sub-s. 2.

In *Jones* v. *Evans* (1) what I may call "rough particulars" were given and held to be sufficient, and it was said that detailed particulars were not necessarily required, such as we know are required in the case of particulars under Order XIX. in respect of pleadings and in an action at law. Here we have a special case, of which the facts are that by a notice to quit the landlord determined the tenancy and it expired on April 6, 1932, and on November 23, 1931, during the currency of the notice, the tenant gave notice to the landlord of his intention to claim for disturbance: I will refer to its terms in a moment. It will be observed that, having regard to s. 16, sub-s. 2, the two months indicated in that sub-section expired on June 5, 1932; hence if there were to be a claim enforced at the arbitration it was necessary before that time for the tenant to give rough particulars of the claim. The particulars he gave are contained in this letter of November 23, 1931, in which he asks for "the additional compensation for loss and expense attributable to my quitting the holding and"—note these words—"which I may unavoidably incur upon or in connection with the sale or removal of my household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connection with the holding, and including any expenses reasonably incurred by me in the preparation of any claim for compensation."

In *In re O'Connor and Brewin's Arbitration* (2) I drew attention to the use of successive adverbs in s. 12, sub-s. 6. The compensation is to be a sum representing the loss and

(1) [1923] 1 K. B. 12.

(2) [1933] 1 K. B. 20, 29.

expense directly attributable to the quitting of the holding which the tenant may unavoidably incur, and there is still another adverb : including any expense "reasonably" incurred by him—directly attributable, unavoidably incurred and reasonably incurred. It is, to my mind, quite impossible that on November 23, 1931, a notice which would suitably indicate the loss or expense in compliance with the terms of sub-s. 6 could have been given by the tenant. It was a notice that at some time a claim would be made.

It seems to me quite wrong to use the word "penal" in respect of the duty imposed by law upon the tenant with regard to giving particulars of his claim. Certain rights are given to him by statute which he had not before, and it is not unfair that he should be required to conform to certain conditions, because in this, as in all other cases, there are two parties to be considered.

It will be observed that sub-s. 6 deals with the compensation and the sum which represents the loss, and we are told how we are to reach, in terms of money, the compensation payable. It would perhaps have been easier if sub-s. 7 had been placed before sub-s. 6, because before we begin to talk about what is the sum to be paid for compensation, the terms of sub-s. 7 must be complied with, and that sub-section says that compensation shall not be payable in respect of the sale of goods, etc., unless the tenant has, before the sale, given the landlord a reasonable opportunity of making a valuation thereof, and there are a number of terms which must be fulfilled by the tenant if he is to make good his claim ; and if and when it is found that compensation is payable, we can go to sub-s. 6 and find out what is the amount to be paid.

It appears to me that the question we have to decide has also been decided in *O'Connor and Brewin's* case. (1) What is the position immediately after the notice to quit has expired and the tenancy has come to an end ? Then, and not before, the tenant will be able to find out and declare what expense, directly attributable to the quitting of the holding, has been unavoidably incurred by him and what expense has reasonably been incurred by him in the preparation of his claim. And it appears to me that sub-s. 2 of s. 16 definitely contemplates and requires that before such a claim can be made which can be sent to arbitration, it is necessary that particulars—roughly given, perhaps, but particulars of some sort—should be supplied to the landlord which will give him sufficient notice to enable him to deal with the claim.

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(1) [1933] 1 K. B. 20.

If we look at *Minister of Agriculture and Fisheries* v. *Dean* (1) it is clearly laid down that some loss must be proved to have been suffered by the tenant. Bankes L.J. there discusses the two views of the construction of sub-s. 6 of s. 10 of the Act of 1920, which corresponds with s. 16, sub-s. 2, of the Act of 1923. He says (2): "Two alternative constructions are before the Court: one that where the tenant is entitled to compensation under the Act and is not claiming more than one year's rent he is entitled to that rent irrespective of the question whether he has suffered any loss or expense whatever attributable to the quitting of the holding; the other construction is that as soon as the tenant establishes that he has suffered some loss or expense directly attributable to the quitting of the holding, he is entitled to his year's rent, and is absolved from the obligation of proving the actual amount of the loss and expense. In my opinion the latter is much the more reasonable construction. Where a tenant proves that he has suffered loss or expense attributable to his removal as indicated in sub-s. 6, it is reasonable enough that he should be relieved of the trouble and difficulty of proving the actual amount; but that on proof of loss and expense he should be entitled to one year's rent as a minimum, and if he does not claim more than that it should not be necessary for him to prove the actual amount of loss or expense. That is a much more reasonable view to take of the intention of the Legislature than to suppose that a tenant is to have a year's rent by way of compensation even where it is manifest that he has incurred no loss or expense whatever. In my opinion the language of sub-s. 6 shows with reasonable clearness the intention of the Legislature to be that the tenant

(1) [1924] 1 K. B. 851.

(2) Ibid. 856.

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is under an obligation, as a condition precedent to his right to compensation, to prove that he has incurred some loss or some expense of the kind indicated in the sub-section, and that on proof of that he shall be entitled as a minimum to one year's rent; but that unless he proves some loss or some expense of the kind indicated he does not bring himself within sub-s. 6, and cannot claim that he is in a position to demand compensation in accordance with the provisions of s. 10."

Following that decision, by which we are bound, it is quite plain that particulars of some sort must be given that the tenant has suffered a definite loss, and the decision really carries with it the principle developed in *O'Connor and Brewin's* case (1), and which is involved we find here. It is not sufficient for the tenant to indicate, months beforehand, that he will in the future make a claim; but at the arbitration he must give some proof that he has suffered a loss, and it is no hardship for him to have to comply with the terms of sub-s. 2 of s. 16.

*Jones* v. *Evans* (2) shows that in 1923 the Court, by a majority, took the view that what I may call "rough particulars" were sufficient. "Particulars," as Bankes L.J. in that case says (3), "may be scanty and require to be amplified, but they still remain particulars provided they contain information as to the nature of the claim as distinguished from the class of claim." It is necessary for the tenant, before the landlord can be made liable for a full year's rent to bear in mind the fact that compensation is not always and in all cases payable under s. 12, but that the conditions of sub-s. 7 are laid upon him for his compliance.

For these reasons, it appears to me that the county court judge took a mistaken view of the effect of *O'Connor and Brewin's* case (1), and the appeal must be allowed.

LAWRENCE L.J. I agree. In my judgment this case is governed by the decision of this Court in *O'Connor and Brewin's* case. (1)

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(1) [1933] 1 K. B. 20.

(2) [1923] 1 K. B. 12.

(3) Ibid. 18.

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Mr. Somervell contended that as the claim was limited to the conventional one year's rent, no particulars of loss or expense need be given, his contention being that the claim was for one year's rent, and that it was sufficiently particularised by the mere statement of it. Not only is this view, which was also taken by the county court judge, contrary to the view taken by this Court in *Jones* v. *Evans* (1) and in *O'Connor and Brewin's* case (2), but, if accepted, it would render s. 16, sub-s. 2, otiose. His argument amounts to a contention that because in the present case, and it may be in many others, it may be said with reasonable certainty that a tenant has incurred or will incur some loss or expense attributable to his quitting the holding, he therefore need not comply with s. 16, sub-s. 2. As, however, that enactment provides that the claim shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars have been given to the landlord within the period, the contention cannot, in my opinion, prevail.

SLESSER L.J. The county court judge has sought to distinguish between a case where a claim is made for an amount which exceeds one year's rent and that which does not. I am unable to see or understand what he calls the fundamental difference in the two claims, as in either case it is necessary to show that there has been a loss, and in both cases it is the right of the landlord to show that there has not been a loss. In order that he may deal with the affirmative statement of the tenant, it is necessary that the landlord should receive such particulars as have been held necessary in *O'Connor and Brewin's* case (2) and *Jones* v. *Evans* (1) and in others. The mere fact that the section provides that the amount may be quantified when it is less than one year's rent does not alter the matter at all, and, as I read the judgment of Romer L.J. in *O'Connor and Brewin's* case (2), and as I certainly intended in my own judgment, this particular question was decided. That case is indistinguishable from the present one, and the particulars supplied by the tenant

(1) [1923] 1 K. B. 12.

(2) [1933] 1 K. B. 20.

were not sufficient to support a claim for one year's rent, or for two years' rent.

*Appeal allowed.*

Solicitors for appellants: *Kingsford, Dorman & Co., for Lucas E. Rumsey, Leicester.*

Solicitors for respondent: *Leonard Hubbard, for Colton & Franks, Newark.*

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*Oct.* 26, 27, 30, 31; *Nov.* 1, 27.

## LANCASHIRE LOANS, LIMITED *v.* BLACK.

*Moneylender—Borrowings by Mother—Promissory Note signed by daughter recently of age—Charge given by daughter on her reversion—Daughter a married woman living with her husband—Emancipation—Undue Influence—Independent advice—Insufficient Memorandum—Transaction set aside—Moneylenders Act,* 1900 (63 & 64 *Vict. c.* 51), *s.* 1—*Moneylenders Act,* 1927 (17 & 18 *Geo.* 5, *c.* 21), *ss.* 6, 7.

There is no rule of law that the marriage of a daughter, coupled with her departure from the parental home, necessarily puts an end to the domination of her parents. Whether or not the parental dominion has completely ceased is a question of fact depending on the particular circumstances of each case.

A daughter married at the age of eighteen and thereupon left her parental home and lived with her husband. Her mother was very extravagant and frequently borrowed money from moneylenders. When the daughter came of age she, at her mother's request, raised 2000*l.* on her reversionary interest under her grandfather's will in order to pay off her mother's debts to moneylenders. The mother continued to borrow money from moneylenders, and a year later the mother asked the daughter to sign a document so that she (the mother) might be able to borrow some more money. The mother and daughter signed a joint and several promissory note for 775*l.* at 85 per cent. interest. Of the 775*l.* 200*l.* was a fresh loan to the mother and 575*l.* was acknowledged by the mother and daughter to be then due and owing to the moneylenders. In reality 410*l.* was money which had actually been advanced to the mother, 90*l.* was for interest, and 75*l.* supposed interest or bonus because the loans were renewed before they were due. The daughter also gave a second charge on her vested interest in remainder without which the moneylenders would not lend the money. The daughter, who did not understand the transaction, signed the document at the request of her mother. The only advice which the daughter received was that of a solicitor who also acted for the mother and the moneylenders, and who prepared the documents. In an action by the moneylenders on the promissory note against both the mother and daughter the judge held that the daughter was emancipated by reason of her marriage and was not under the influence of her mother, but he held the transaction was harsh and unconscionable and reopened all the transactions and gave judgment against both mother and daughter for the sums actually lent with interest at a reduced rate. On appeal by the daughter:—

*Held*, that the daughter was under the influence of her mother when she entered into the transaction in question, and also that she had no independent advice, and that as the moneylenders had notice of the facts which constituted undue influence on the part of the mother they were in no better position than the mother, and that therefore the transaction must be set aside so far as the daughter was concerned.

Decision of du Parcq J. as to the daughter reversed.

Per Scrutton L.J.: The memorandum of the transaction of August 5, 1931, was void because it did not state the real transaction. It contained an admission by the mother that 575*l.* was then due and owing by her, whereas at that date nothing was due, and if it were assumed that the principal and pro rata interest were then to be paid, the amount payable would only be about 535*l.*, and there would be a bonus to the moneylenders of about 40*l.* for accepting payment before it was due, which ought to have been stated on the face of the memorandum, but was not. In effect the moneylender was obtaining interest on interest, which was prohibited under s. 7 of the Moneylenders Act, 1927.

APPEAL from a decision of du Parcq J.

The plaintiff company, Lancashire Loans, Ld., carried on the business of moneylenders. The first defendant, Mrs. Ada Louisa Black, was a married woman, and the second defendant, Mrs. Alphea Joan Black, was her daughter. Mother and daughter had the same surname because the mother's second husband was the father of the daughter's husband.

The plaintiffs claimed against both defendants a sum of 2001*l.* 0*s.* 5*d.* together with interest on the sum of 939*l.* 13*s.* 9*d.* at the rate of 85 per cent. from March 4, 1933, the date of the writ and statement of claim.

The following statement of facts is taken substantially from the judgment of du Parcq J.:

"Mrs. A. L. Black's father, Charles Arthur Barrett, was dead and had left an estate of over 240,000*l.* By his will Mrs. A. L. Black's mother had a life interest in the residue of the estate without power of anticipation, and had an income of about 10,000*l.* a year. At the date of the action Mrs. A. L. Black's mother was about seventy-seven years of age. On her death Mrs. A. L. Black would be entitled to the income of one-fourth share of the residue without power of anticipation, and she also had a power of appointment by will of that one-fourth share among her children, and in default of appointment the share would be divided equally between her children, including the second defendant, Mrs. A. J. Black.

"In October, 1929, Mrs. A. L. Black made an application for a loan to Thomas Henry, Ld., of Liverpool, a company carrying on business as moneylenders, and was interviewed by Mr. Lessar, who subsequently became the managing director of the plaintiff company. Mrs. A. L. Black showed him a copy of her father's will, and told him the amount of her father's estate.

"Mr. Lessar's employers were not willing to make an advance to Mrs. A. L. Black, and she then made an application to another firm of Liverpool moneylenders, named Barclay's Trust. Barclay's Trust, wanting some investigation of her financial position, introduced Mrs. A. L. Black to Mr. Naphtali Julius Price, a Liverpool solicitor, whose clients they were. Mr. Price was made acquainted with the terms of Mr. Barrett's will. Mr. Price reported the result of his investigations to Barclay's Trust, and they made a loan to Mrs. A. L. Black.

"Mrs. A. L. Black had already attempted to raise a loan from the Legal and General Assurance Society, Ld., by mortgaging her daughter's reversionary interest under the will. When these negotiations began Mrs. A. L. Black had forgotten or overlooked the fact that the second defendant would not attain the age of twenty-one until March 12, 1930. She had apparently been under the mistaken impression that her daughter was born in 1908 and not, as the fact was, in 1909. Later Mrs. A. L. Black borrowed from another firm, which was an amalgamation of the two companies already mentioned, and was known as Barclay & Henry, Ld. Shortly after her visit to Mr. Price she had become one of his clients. The object of her consultations with him seems always to have been the raising of money. She was, he says, 'generally in financial difficulties.'

"Later, in 1929, or early in 1930, Mrs. A. J. Black, whilst still under the age of twenty-one, also became a client of Mr. Price.

This young woman had married before she was eighteen, and soon became the mother of two children. Her husband earned little money and was unable to support his wife and family. She had turned to her mother for support and found her generous, and there was great affection between them. She was now quite willing to fall in with her mother's suggestion that she should relieve the mother's financial embarrassment by mortgaging her reversion. Her twenty-first birthday was approaching and Mr. Price was instructed by both mother and daughter to have everything in readiness for that date. Mrs. A. L. Black, he says, 'always gave me to understand that she had spent a lot of money on Mrs. A. J. Black. . . . . She took the line that she was entitled to some assistance from her daughter.' As for Mrs. A. J. Black, she 'thought herself under an obligation to her mother.' On March 28, 1930, Mrs. A. J. Black executed the mortgage of that date to secure the repayment of a loan of 2000*l.*, Mrs. A. L. Black having previously on March 25 covenanted to exercise her power of appointment in favour of Mrs. A. J. Black. Mrs. A. L. Black was a party to the deed and covenanted to pay the interest on the loan. A day after executing the mortgage Mrs. A. J. Black signed an authority to Mr. Price which empowered him to pay to her mother all moneys received by him on her behalf from the Assurance Company; 1142*l.* of it went to repay to Barclay's Trust moneys due to them from her mother. Part of it was used to pay Mr. Price's charges. The balance, with the exception of 100*l.*, went to the mother; the daughter was allowed to have 100*l.* for herself. It may safely be said that she had amply discharged her obligation to her mother.

"It was not long before Mrs. A. L. Black was again in need of money. In September, 1930, she renewed her acquaintance with Mr. Lessar. At this date she was apparently owing nothing to moneylenders. A chance meeting in Liverpool led to a friendly conversation in a café. Mr. Lessar's account of the interview given in evidence was as follows: 'She asked me about a loan. I told her I was now a director of Lancashire Loans, Ld. She told me that she was married,

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that her husband was a traveller, and that she had a voluntary allowance of 350*l.* a quarter from her mother. Her house and furniture were her own property.' Mr. Lessar wanted proof of these statements and was referred by Mrs. Black to her solicitor, Mr. Price. This was reassuring, because it happened that Mr. Price had been the solicitor who had acted in the incorporation of the plaintiff company in March, 1930, and he was one of three solicitors to whom the plaintiff company was in the habit of giving its business. It appeared, however, that her husband was not to be approached. 'She did not want to let her husband know anything about the loan.' Mr. Lessar said he would consider the matter and write. Having left the would-be borrower in this state of suspense he decided to leave the matter in abeyance and wait. 'I knew,' he says, 'that eventually she would come back to me.' Nor was his judgment at fault. In November she telephoned to him and was told that she must write in the usual way. On November 11, 1930, she wrote to ask for a loan of 150*l.* for three months, referring the plaintiffs to Mr. Price. Mr. Price could only say that according to his instructions the house was in Mrs. A. L. Black's name and its contents were her property. Mr. Lessar says that he thought the business was very speculative, but he was ready to lend the money at 240 per cent. Mrs. A. L. Black agreed. Mr. Lessar said in evidence: 'I don't think she minded what the interest was, so long as she got money.' Accordingly, a promissory note was given on November 12 and 150*l.* was advanced. Shortly after it fell due in February, 1931, the borrower expressed her willingness to settle, Mr. Lessar offered to take 182*l.* 10*s.* for an early settlement. This worked out at 72 per cent. per annum, and on these terms the transaction was closed.

"The next loan was in March, 1931. The sum advanced was again 150*l.* Mr. Lessar asked: 'Will you be satisfied if I only charge you 30*l.* for three months?' and says that she seemed very well satisfied. That worked out, as the promissory note which she signed on March 4, 1931, shows, at 85 per cent. per annum. Mr. Lessar told me that Mrs.

A. L. Black is 'not a business woman—far from it,' and her need for money was pressing.

"The substance of the next transaction was as follows: On May 28, 1931, Mr. Lessar handed Mrs. A. L. Black 300*l.* The borrower handed back 180*l.* so nominally repaying the March loan before its maturity, but without any reduction in the sum of 30*l.* charged for interest. This gave her 120*l.* for herself, in return she gave a promissory note for 300*l.* at 85 per cent. per annum. The due date of the promissory note for 300*l.*, allowing for days of grace, was August 31, 1931.

"In July Mrs. A. L. Black again wanted money for various domestic reasons, one of which was that the second defendant's husband was out of work. She mentioned 200*l.* At first Mr. Lessar was obdurate, but he finally agreed to lend her another 140*l.* The nominal advance was 500*l.*, of which 360*l.* went back to the plaintiff company to satisfy the promissory note of May 28, and a new promissory note was given on July 3 for 500*l.* with interest at 85 per cent. Mr. Lessar says, and I see no reason to differ from him, that he does not think that Mrs. A. L. Black was capable of working out the rate of interest which she is seen to have been charged when the substance of the transaction of July 3 is looked at. He certainly said nothing to arouse her curiosity as to the correct solution of this practical problem in simple arithmetic.

"The due date of the July promissory note was expressed to be October 7, but before July was out Mrs. A. L. Black again wanted money. This time Mr. Lessar was adamant. Unless she could give security there would be no loan. There was talk of a bill of sale, but it came to nothing. The suggestion was made, possibly by Mrs. A. L. Black, though she says emphatically that it came from Lessar, that her daughter, the second defendant, might give a charge on her reversionary interest. Mrs. A. L. Black said that Mr. Price was acting for both herself and her daughter, and Mr. Lessar had better see him. Mr. Lessar did so, and Mr. Price was not encouraging. He had already tried to raise a further sum upon the reversion from the Legal and General Assurance Society, and they had refused any further advance. When, however, Mr. Lessar found that Mrs. A. L. Black would be willing, if she could borrow a substantial sum in cash and be quit of her accruing liability, to make herself liable to pay 575*l.*, plus the sum actually advanced plus interest at a rate which would satisfy him, he thought the business worthy of his attention. It was at this stage that the plaintiff company had any communication with the daughter Mrs. A. J. Black. Mr. Lessar told Mrs. A. L. Black that her daughter must write a letter and, while I am not satisfied that any suggestion as to the amount to be mentioned in it came from him, I have no doubt that he indicated what its purport should be.

"There was an interview between the mother and the daughter. I accept Mrs. A. J. Black's evidence as to this. It is as follows: 'My mother spoke to me. She said, "I want some money, I am very hard up. If you sign something I shall be able to get the money." She wrote a letter out for me to copy.' This was the letter of July 31, 1931, which in due course reached the plaintiffs. It is in these terms:

"'I am desirous of making a loan with you for a 100*l.* or more and will sign the notes together with my mother, Mrs. A. L. Black. We have asked Mr. Price, our solicitor, of Dale Street, Liverpool, to prepare the necessary papers, and shall be glad if you will complete this matter at Mr. Price's office on Tuesday next, August 4th, at 12 noon, as arranged with my mother on the 'phone and I will keep the appointment. Yours truly, Alphea Joan Black.'

"After the receipt of this letter Mr. Lessar had a telephone conversation with Mrs. A. J. Black. He says that he told her that much more than 100*l.* was to be advanced, and gave her an explanation of the transaction. Apparently she had not understood her mother's explanation and I am not satisfied that she understood his. However that may be, he says that 'she made no objection.' At about this time mother and daughter called on Mr. Price and he was told what was in prospect. Mr. Price says that they instructed him to give Mr. Lessar all the information he wanted 'as to the will and a second charge subject to the Legal and General charge.' It appeared that the figures had not been finally fixed with Mr. Lessar, but Mr. Price says that Mrs. A. L. Black mentioned some figures. He had no doubt, so he told me, that Mrs. A. J. Black understood what was going forward. He regarded both women as his clients, as indeed they were. He says that he pointed out to them that 85 per cent. was a large percentage of interest and suggested that they should not carry out the transaction, but he did not think the rate grossly excessive. He says also that he explained to Mrs. A. J. Black the nature of the transaction. That he did so with a particularity which would have been adequate in the case of many transactions I do not doubt, although I am not convinced that she wholly comprehended his explanation. It is clear to me, however, that except for a mild and perfunctory reference to the undesirability of borrowing at a high rate of interest, he said nothing to draw the younger woman's attention to what many solicitors might have thought to be the enormity of the transaction. He knew that apart from her expectations under her grandfather's will she had no prospects. He knew that she had not a penny in the world. He thought and had so advised the plaintiff company that the security she was giving was of no value. I should have expected him to point out to a client not long of age who, in such circumstances, contemplated a transaction of such a kind, that she would be saddling herself with a liability which before long might have to be reckoned in thousands rather than hundreds of pounds, with no prospect of ever meeting it except by the favour of relations and friends. I should have expected also that he would have impressed upon her the fact that there was at least a prima facie case for the view that the interest which her mother had agreed to pay and which she was asked to agree to pay was not merely large but excessive, and so excessive as to make the transaction appear harsh and unconscionable. He ought, in my judgment, to have made it clear to her that no Court was likely to enforce the obligation by which, at that date, she supposed her mother to be bound. He would not, I think, have gone beyond his province if he had tendered to her the further advice, as solicitor and man of business, that both wisdom and true kindness dictated a refusal of her mother's request. I am satisfied that he said none of these things. Acting as he was for both mother and daughter, it would no doubt have been difficult for him to do so without giving offence to one of his clients. I think, indeed, that Mr. Price had put himself in a position in which it was impossible for him to do his duty to both his clients and, while I accept his statement that he was conscious of no embarrassment, I think that it evidences a lack of appreciation of the delicacy of his position. That position does not appear any happier when it is seen that at the completion of the transaction he was acting as solicitor not only for both the defendants but for the plaintiffs, the moneylending company.

"After this interview Mrs. A. L. Black finally agreed the figures with Mr. Lessar, and on August 1 Mr. Lessar got into touch with Mr. Price. In the result the transaction was completed on August 5.

"The memorandum required to satisfy the Moneylenders Act of 1927 and the mortgage were prepared by Mr. Price who, by this time, was acting for all parties. On August 5, Mrs. A. L. Black was unwell and stayed at home, but Mrs. A. J. Black met Mr. Lessar at Mr. Price's offices and Mr. Lessar typed out a promissory note. Mr. Price read the memorandum aloud. It was as follows: 'To Lancashire Loans, Limited, 155 Breck Road, Anfield, Liverpool. I the undersigned Ada Louisa Black am willing to borrow from you on 5th day of August, 1931, the sum of 200*l.* and I agree and acknowledge that the amount now owing by me to you in respect of a promissory note dated the 3rd day of July, 1931, is 575*l.*, which sum I agree to treat as a present liability. In consideration of the said loan of 200*l.* and the discharge of my liability to you under the said promissory note, I agree to make a new joint and several promissory note in your favour for the principal sum of 775*l.*, being the total of the said sums of 200*l.* and 575*l.* in the terms below set out. And I the undersigned Alphea Joan Black (known as Althea

Joan Black) in consideration of your making the said loan of 200*l.* to Ada Louisa Black and discharge her liability to you under the said promissory note dated the 3rd day of July, 1931, agree to join as surety in making the said joint and several promissory note for the principal sum of 775*l.* in the terms set out below.'

"'775*l.* August 5, 1931. We jointly and severally promise to pay to Lancashire Loans, Limited or order at 155 Breck Road, Anfield, Liverpool (or at such place as may be directed) the sum of seven hundred and seventy-five pounds, this day advanced to us together with interest at the rate of eighty-five per cent. per annum. Such sum of seven hundred and seventy-five pounds to be paid together with interest then due by consecutive quarterly instalments of 250*l.* each, commencing on the 4th day of November next. The whole balance becoming due and payable on May 4, 1932. In the event of default being made in the payment of any sum whether by way of instalment of principal or interest the whole balance of the principal then remaining due shall forthwith become due and payable together with interest to date of such default and interest at the rate aforesaid shall thereupon and thenceforth accrue from day to day upon the amount (whether principal or interest) which shall have become due and payable upon such default being made, such further interest to be payable at any time and from time to time upon demand. And I the undersigned Alphea Joan Black (known as Althea Joan Black) hereby further agree to further secure the repayment of the said principal sum of 775*l.* by executing a mortgage in your favour of (1.) all my share or interest to which I am now or may become entitled under the will of Charles Arthur Barrett deceased and a deed of covenant dated the 25th March, 1931, made by the above named Ada Louisa Black in my favour of or in the settled share of the said Ada Louisa Black. (2.) A policy of insurance effected on my life with the Pearl Life Assurance Company Limited for 1000*l.* (3.) Indemnity policy with the Legal and General Assurance Society Limited dated the 27th day of March, 1930, in accordance with the document hereunto annexed the contents of which shall be deemed to be

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incorporated in the Memorandum. And I agree that as between myself and yourself I shall be considered as a principal debtor for all monies to become payable under the said new joint and several promissory note and that I shall not be released by time being given by you to the said Ada Louisa Black or by any variation in the provisions of the said promissory note or mortgage or any other act omission matter or thing whereby as a surety only I would have been so released.'

"Mrs. A. J. Black signed the memorandum, signed the receipt at its foot for a copy of the memorandum, and signed a promissory note in which the word 'us' after 'advanced to' was curiously omitted. Mr. Lessar then went to the house of Mrs. A. L. Black who was unwell and unable to leave it. She signed the memorandum as her daughter had done and signed the promissory note and, although she thinks that she was only paid 100*l*., her recollection is so weak and unreliable that I feel bound to hold on the evidence that Mr. Lessar paid her 200*l*..

"Nothing had been paid by either defendant in respect of this promissory note."

In answer to the plaintiffs' claim for principal and interest due under the joint and several promissory note of August 5, 1931, the defendant Mrs. A. L. Black said that the transaction was harsh and unconscionable, and she asked to have that transaction and all previous transactions between her and the plaintiffs reopened. She also alleged that there was no sufficient memorandum to satisfy s. 6 of the Moneylenders Act, 1927.

The second defendant, Mrs. A. J. Black, alleged that in signing the promissory note and mortgage dated August 5, 1931, she acted under the undue influence of her mother, that she received no separate or independent advice; that the transaction was harsh and unconscionable, and that the memorandum did not comply with s. 6 of the Moneylenders Act, 1927.

du Parcq J. held that the memorandum was sufficient to satisfy s. 6 of the Moneylenders Act, 1927; that Mrs. A. J. Black was emancipated when she married at the age of 18 and left her mother's home to live with her husband, and that she was not under the undue influence of her mother at the time she signed the promissory note, but that she did not understand the transactions. He held that the transaction was harsh and unconscionable and the interest excessive; it was a bargain into which the plaintiffs must have known that no person of intelligence and experience could have been induced to enter, and he therefore reopened all the transactions but he did not set aside the security. He gave judgment for the plaintiffs against the first defendant, but without costs, for the sums actually advanced to her amounting in all to 610*l.*, together with interest at the rate of 40 per cent. per annum from the date of the advances until August 5, 1931, and from that date until judgment at the rate of 12 per cent. He gave judgment against the second defendant for the same sum, but ordered the plaintiffs to pay five-sixths of the second defendant's costs.

The second defendant, Mrs. A. J. Black, appealed, asking to have the whole transaction set aside. The plaintiffs also appealed on the question of interest and costs. The first defendant, Mrs. A. L. Black, did not appeal.

*Sullivan K.C.* and *Harold Simmons* for the daughter, Mrs. A. J. Black. The transaction ought to be set aside so far as the daughter is concerned, as she entered into the transaction soon after she came of age, and for her mother's benefit and when she was presumably under her mother's influence. There is a presumption in equity of the existence of undue influence arising from the relationship of mother and daughter. That presumption is conclusive during the minority of the daughter and continues after the termination of the minority until the Court is satisfied that the influence has ceased. In considering whether a particular transaction arose from undue influence the Courts have to consider not only the relationship of the parties but also the nature of the transaction and of the property which the daughter has lost. Courts of equity have always protected young persons from disposing of reversions not fallen into possession. The property in the present case was a reversion and it was being dealt with by

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the mother, Mrs. A. L. Black, who had a power of appointment, for her own benefit. Such exercise of the power was a fraud on the part of the appointor and the daughter is entitled to have the transaction set aside. The principles upon which courts of equity act were stated by Lord Eldon L.C. in *Hatch* v. *Hatch* (1), where a conveyance by a ward to her guardian was set aside upon grounds of public policy after a great lapse of time. In that case the ward was only just of age when she executed the conveyance. In *Archer* v. *Hudson* (2), a niece, two months after she came of age, entered into a joint and several promissory note as surety for her uncle, who stood to her in loco parentis, and the Court set it aside. Lord Langdale M.R. said (3) that "if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete 'emancipation,' without any benefit moving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child, and that it is the business and the duty of the party, who endeavours to maintain such a transaction, to shew, that the presumption is adequately rebutted." This decision was affirmed by Lord Lyndhurst L.C. (4), who referred to *Hatch* v. *Hatch* (1) as laying down the principle upon which the case ought to be decided. A voluntary settlement was set aside in *Huguenin* v. *Baseley* (5) on the ground of undue influence. In *Baker* v. *Bradley* (6) it was laid down that transactions between parent and child, if in the nature of bounty from the child soon after the child attains majority, are viewed with jealousy by the Court and that the Court will interpose its protection to guard the child from the exercise of parental influence. See also *Wright* v. *Vanderplank* (7) and *Savery* v. *King*. (8) The principle does not rest merely upon relationship; wherever there exists a condition of confidence between two parties such as that existing between guardian and ward, solicitor and client, trustee and cestui que trust, by the existence of which the party in whom confidence is placed obtains an advantage over the other, the transaction is set aside. In *Rhodes* v. *Bate* (1) Turner L.J. said: "I take it to be a well established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." Lord Hatherley L.C. said in *Turner* v. *Collins* (2): "Influence is a thing which is assumed as between father and child . . . . and it is then thrown upon the father, if he takes any benefit, to prove what is called the righteousness of the transaction."

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(1) (1804) 9 Ves. 292.
(2) (1844) 7 Beav. 551.
(3) Ibid. 560.
(4) (1846) 15 L. J. (Ch.) 211.
(5) (1807) 14 Ves. 273.
(6) (1855) 7 De G. M. & G. 597.
(7) (1856) 8 De G. M. & G. 133; 25 L. J. (Ch.) 753.
(8) (1856) 5 H. L. C. 627, 655.

[LAWRENCE L.J. referred to the judgment of Farwell J. in *Powell* v. *Powell*. (3)]

The emancipation of a child according to equity is not the emancipation of the Roman law, but means the complete freedom of the child from the previous influence of its parent. In *Inche Noriah* v. *Shaik Allie Bin Omar* (4) Lord Hailsham in delivering the judgment of the Privy Council approved of the judgment of Cotton L.J. in *Allcard* v. *Skinner* (5) as laying down the principles to be applied. His Lordship did not throw any doubt upon the decision in *Powell* v. *Powell* (3), but merely said that they were not prepared to accept the view that independent legal advice was the only way in which the presumption of the influence of the donee over the donor could be rebutted, or that independent legal advice when given did not rebut that presumption unless it could be shown that the advice was taken; it was sufficient if there was competent independent advice. The moneylenders, having left it to the mother to find a surety, were bound by what she had done: *Turnbull & Co.* v. *Duval*. (6) That case was not a case of undue influence; a wife was induced by her husband to sign, without independent advice, a document which was very different from what she supposed it to be and of the true nature of which she had no knowledge, and it was held that the transaction could not stand. Lord Lindley said (1) that the creditors "left everything to Duval [the husband], and must abide the consequences." It is true that a contract of suretyship is not one requiring uberrima fides on the part of the creditor, nevertheless if any material fact is either misrepresented to, or its existence fraudulently concealed from, the surety, the contract is invalidated: see White and Tudor L. C., 9th ed., vol. ii, p. 526; *Davies* v. *London and Provincial Marine Insurance Co.* (2) The judge has said that the daughter was not subject to the undue influence of her mother, but he has disregarded the fact that the mother came to the daughter and asked her to sign some documents and said that if the daughter did so, the mother would be able to get some money. The judge has found that the daughter did not understand the transaction. Those documents did not merely secure a new loan to the mother, but also made the daughter liable for the past loans to the mother and also for interest at an excessive rate. On that ground also the daughter is entitled to succeed.

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(1) (1865) L. R. 1 Ch. 252, 257.
(2) (1871) L. R. 7 Ch. 329, 339.
(3) [1900] 1 Ch. 243.
(4) [1929] A. C. 127, 132.
(5) (1887) 36 Ch. D. 145, 171.
(6) [1902] A. C. 429.

The note or memorandum of the contract did not comply with s. 6 of the Moneylenders Act, 1927, and therefore the transaction is not enforceable at law. The memorandum must contain all the terms of the contract, including the amount of the principal of the loan, and by s. 15 "principal" means in relation to a loan "the amount actually lent to the borrower." The statement that 575*l.* was due from the borrower was untrue; that sum included not only the sum actually lent but also interest and a bonus to the moneylender. The transaction was harsh and unconscionable within s. 1 of the Moneylenders Act, 1900: see *Moxon* v. *Payne.* (3) It was held in *Temperance Loan Fund, Ld.* v. *Rose* (4) that where a transaction between a moneylender and a borrower involved the renewal of an old loan, that fact ought to be set out in the

(1) [1902] A. C. 435.
(2) (1878) 8 Ch. D. 469, 475.
(3) (1873) L. R. 8 Ch. 881.
(4) [1932] 2 K. B. 522.

memorandum in order to comply with s. 6. That was not done in the present case.

*A. Grant K.C.* and *R. F. Levy* for the moneylenders. The judge was right in holding that the daughter was emancipated and not under the undue influence of her mother at the time she signed these documents. When a woman is married and living with her husband away from her mother she is no longer in law under parental influence. There is no reported case where a daughter has been held to be, in such circumstances, under the dominion of her mother. Since the passing of the Married Women's Property Acts the position of married women has completely changed, and that alteration in position has extended to single women, who are no longer regarded as being subject to parental influence. The presumption that a daughter is under the dominion of her mother is out of date. The statement of Turner L.J. in *Rhodes* v. *Bate* (1) had reference to the relationship arising from professional association and not to the relationship of mother and child. It is generally presumed that after the expiration of a year from the coming of age of a child the child would be able to think for itself and therefore be free from influence: see *Smith* v. *Kay*. (2) The presumption of dominion does not arise when a daughter has married and left her mother and lived with her husband for four years before the alleged domination of the mother took place. A distinction must be drawn between undue influence and the love and affection arising between parent and child. A mother can receive money from a child out of the child's affection without it being due to the undue influence of the mother. The principle upon which the Courts have acted was stated by Lord Langdale M.R. in *Archer* v. *Hudson*. (3) Having regard to the finding in the present case that the daughter was emancipated the presumption of undue influence does not arise. A wife is presumed to be under the dominion of her husband, and it would be absurd to say that she could at the same time be under the dominion of her mother. This view is confirmed by the subsequent conduct of the daughter, because she subsequently consulted three solicitors and no one suggested that the transaction could be impeached.

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(1) L. R. 1 Ch. 252, 257.
(2) (1859) 7 H. L. C. 750, 772.
(3) 7 Beav. 551, 560.

The power of the Court under s. 1 of the Moneylenders Act, 1900, to set aside the transaction (including the security) as harsh and unconscionable is a discretionary one. The judge in the present case has exercised his discretion and come to the conclusion that he ought not to set aside the security. This Court will be loth to interfere with that exercise of discretion. Sect. 6 of the Act of 1927 was complied with, inasmuch as the substantial terms of the agreement were set out in the agreement. The amount stated in the memorandum as being due from the two defendants was due by agreement, and that was sufficiently stated in the memorandum.

*Constantine Gallop* for the mother, Mrs. A. L. Black.

*Sullivan K.C.* replied.

*Cur. adv. vult.*

Nov. 27. The following judgments were read :—

SCRUTTON L.J. Lancashire Loans, Ld., moneylenders, brought an action against a mother, Mrs. A. L. Black, and a daughter, Mrs. A. J. Black, to recover principal and interest (over 2000*l.*) alleged to be due from both, the mother as principal debtor, the daughter as surety on a moneylending transaction in August, 1931. The mother asked to reopen moneylending transactions beginning in November, 1930, as " harsh and unconscionable " transactions under the Moneylenders Act of 1900, and also because there was no sufficient memorandum under s. 6 of the Moneylenders Act, 1927. The daughter asked that the transaction of August, 1931, should be set aside (1.) because she was induced to enter into it by the undue influence of the mother, and did not understand the transaction ; (2.) because it was " harsh and unconscionable " ; (3.) because of the above defect in the memorandum. The judge declined to deal with the matter on the ground of undue influence and supported the memorandum, but did find the transactions " harsh and unconscionable " and therefore reopened them. He ordered the mother to repay the amount actually lent her, 610*l.*, with a reduced rate of simple interest, 40 per cent. up to the time when the daughter became surety, 12 per cent. after that date, an amount coming in all to 764*l.* 6*s.* 10*d.*, and gave the plaintiffs no costs against the mother. As against the daughter he gave judgment for a similar amount, but ordered the plaintiffs to pay her five-sixths of her costs.

Against this judgment the daughter appealed, asking to have the whole transaction set aside against her. In her appeal the moneylenders cross-appealed, asking, while accepting the figure of 610*l.*, money lent, that the simple interest should be increased from 40 per cent. and 12 per cent. to 85 per cent., and that they should have the costs of the proceedings. The moneylenders also appealed against the judgment so far as it concerned the mother, asking for a similar change as to interest and costs. The mother did not appeal.

I may say at once so far as the cross-appeal and appeal of the moneylenders are concerned, the Court would be exceedingly slow to interfere with the rate of interest and orders as to costs fixed by the trial judge if they did not interfere with his judgment as to undue influence, or as to reopening the account. Indeed in such a case I think the decision of the House of Lords in *Donald Campbell & Co.* v. *Pollak* (1) would prevent any interference with the judge's order as to costs.

The substantial questions in the appeal therefore are (1.) whether on the ground of the mother's influence on the daughter, and the moneylenders' knowledge of the circumstances, or on the ground of the harsh and unconscionable nature of the transaction, the transaction of August, 1931, should be set aside so far as the daughter is concerned; (2.) whether the memoranda are sufficient.

The history begins with the testamentary dispositions of Mr. Barrett, which resulted in a sum of about 240,000*l.* being in the hands of the Public Trustee on certain trusts. His wife, then Mrs. Barrett, now Mrs. Branson (referred to in this judgment as "the grandmother"), had the income for life without power of anticipation, an income of about 10,000*l.* a year. She is now of the age of seventy-seven and entered into a second marriage, at the age of seventy-one, six years ago. On her death the income was to be divided equally between her four children, one of whom is now Mrs. Ada Louisa Black, referred to hereafter as " the mother " of the other defendant, Mrs. Alphea Joan Black, referred to hereafter as " the daughter." On the death of the grandmother the mother would be entitled to an income of about 2500*l.* a year without power of anticipation. The mother had a testamentary power of appointment amongst her children, but in default of appointment, the capital would pass in equal shares to her children, including the daughter Joan, who would on the death of grandmother and mother be entitled to a sum depending on the number of her mother's children who reached twenty-one, then about 20,000*l.*, now about 15,000*l.* if all do reach that age. The grandmother was born in 1856, the mother in 1887. The mother had another child in 1931 ; any further children might lessen the daughter's share. The daughter was born in March, 1909, and married in March, 1927 ; she came of age in March, 1930, and was separated from her husband in 1932, going back to her mother's house.

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(1) [1927] A. C. 732.

The mother was a very extravagant woman, who was quite unable to restrict her wants to her actual income, apparently only a voluntary allowance of 1000*l.* a year from the grandmother, and evidently anticipated in expenditure her future income when the grandmother should die. So long as she could get money, however little in the present, she was quite indifferent to the amount she was to pay for it in interest in the future. When she endeavoured to raise money for herself on her daughter's expectations or property she says herself : " Sums were being raised for my benefit only. I did not think about matter [*sic*] whether it was for my daughter's benefit." The manager of the moneylenders says : " The mother is not a business woman, far from it. . . . . I did not mention anything about percentage [of interest] to her. I don't think she minded what the interest was so long as she got money."

In 1929 the mother was indebted to moneylenders, Barclay's Trust, in over 1000*l.*, and tried to raise money to pay them on her daughter's expectant interest in the trust fund, which was then not vested in the daughter, for the mother might exercise her power of appointment. The mother, however, forgot to remember the trifling obstacle that her daughter was a minor. In 1930 as soon as the daughter came of age she did raise money at her mother's request by a charge on what became her vested interest in remainder by the mother's covenanting not to exercise her power of appointment so as to defeat the daughter's interest in default of appointment. Two thousand pounds was borrowed from the Legal and General Assurance Company at 5½ per cent., reduced to 4½ per cent. on punctual payment of interest. There was then no possibility of the daughter's repaying the money lent until her grandmother and mother died. The mother undertook, as surety and to relieve her daughter, to pay the interest for which the daughter was primarily liable, and the premiums on two policies of insurance charged as security in default of the daughter making such payment. Of the 2000*l.*, 100*l.* went to the daughter; 1100*l.* odd to the Barclay's Trust to defray the mother's debt, and the rest after paying the costs, including those of a Mr. Naphtali Price, a solicitor acting for mother and daughter, to the mother. It will be seen that the daughter got very little benefit out of the loan. The validity of this transaction as concerns the daughter is not in question in the present action, and it is only material because, besides having a bearing on the question of undue influence, it brings on the scene Mr. Naphtali Price, who plays a prominent part in the transactions which are in question. Mr. Naphtali Price comes on the scene because one of his clients was Barclay's Trust, who wanted to have 1100*l.* repaid by the mother. Barclay's Trust introduced Mr. Price to the mother and daughter in 1930, and he advised them as to the loan and charges. In cases where independent advice may be desirable or essential, it is very unsatisfactory that the moneylender provides the borrower with an advising solicitor in close touch with the moneylender's firm. Mr. Price, besides having acted for Barclay's Trust, was also the solicitor who incorporated Lancashire Loans, Ld., the present plaintiffs, and was one of the three solicitors acting for them, and took a considerable part in carrying through for them the transaction attacked in the present case. To consider him as an independent adviser of the mother and of the daughter requires a considerable stretch of imagination. The daughter required advice independently of the mother.

The mother having got the bulk of the 2000*l.* by the charge on her daughter's property in September, 1930, was in difficulties again in September and November, 1930, and came into communication with a Mr. Lessar, the manager of the plaintiffs. The plaintiffs had been incorporated in March, 1930, by Mr. Price, and about the same time Barclay's Trust was in liquidation. A Mr. Goodenday had been interested in Barclay's Trust, and he financed the plaintiff company by a loan secured by a debenture. On Mr. Lessar asking the mother for information she referred him to Mr. Price as her solicitor, which of course was quite satisfactory to Mr. Lessar, as Mr. Price had formed the plaintiff company and acted for it.

On November 12, 1930, the plaintiff company lent the mother 150*l.* at the moderate rate of 240 per cent. The lady had then only the voluntary allowance of 1000*l.* a year from the grandmother, and a reversion of about 2500*l.* a year on the death of the grandmother, then aged 73, with restraint on anticipation. The mother paid, on February 20, 1931, 8 days after the due date, a sum of 182*l.* 10s., the plaintiffs reducing the interest from 240 per cent. to about 70 per cent.

The mother was again in want in March, 1931, and borrowed 150*l.* from the plaintiffs at 85 per cent. interest, repayable on June 4, 1931. No question arises as to the memorandum on these two loans.

On the next two loans a different procedure was followed. The second loan of 150*l.*, due on June 4, 1931, was renewed, before it was due, on May 28 by a new loan of 300*l.*, of which 120*l.* was paid to the mother, and 180*l.* was treated as the repayment of the old loan, a week before it was due. Interest on 150*l.* at 85 per cent. was roughly 30*l.*, and that 30*l.* was re-lent at 85 per cent., interest being charged on interest. This transaction, however, is trivial compared with the next one.

Three hundred pounds with interest at 85 per cent. was due on August 28, but on July 3 the mother wanted more money, and on that date the loan of 300*l.* was renewed nearly two months before it was due by a transaction in which the mother received 140*l.*, and became liable to repay 500*l.* on October 7, 360*l.* being treated as the repayment of the loan of 300*l.* and interest eight weeks before it was due. Interest at 85 per cent. pro rata would be under 30*l.*, the balance to make up to 60*l.* was in effect a bonus to the moneylenders. I deal with the effect of this transaction in dealing with the memorandum. I think for the reasons there given the memoranda of this transaction and the transaction of May 21 were both insufficient, and also the charging of interest on interest was illegal.

The moneylenders seem to have perceived the advantage of this system of premature renewals in piling up indebtedness, but wanted more security. We come now to the transaction of August 5, 1931, in which the daughter's property is used as a security again. At this date none of the principal or interest on the first loan by the Legal and General Assurance Co. had been repaid, and they declined to make any further advance. The Lancashire Loans Co. were ready to make a further advance of 200*l.* to the mother if the daughter would secure not only this advance but also the mother's existing debt to the Lancashire Loans Co. by a second charge on the daughter's vested interest under the will. The system of the last two loans was again resorted to. The 500*l.* loan of July 3 was not due with interest till October 7, 1931. But it was renewed on August 5 as a new loan of 575*l.* Pro rata interest from July 3 to August 5 was between 35*l.* and 40*l.* This sum was increased to 75*l.* under the name of interest, nearly 40*l.* of which was simply a bonus to the moneylenders, and the daughter was made a surety, and her vested interest in remainder charged with a sum of 775*l.*, 200*l.* to the mother, 500*l.* the old loan to the mother, of which 410*l.* was money actually advanced to her and 90*l.* was interest, and 75*l.* supposed interest and/or bonus on the 500*l.* Interest was to be paid at the rate of 85 per cent. on interest agreed to have accrued at 85 per cent. This was, of course, illegal, but the memorandum alleged that mother and daughter had agreed that 575*l.* was due on the last loan.

In fact it was not due. I deal with the effect of this transaction on the memorandum later.

The judge has accepted the daughter's statement of how this transaction began. She says: "My mother spoke to me. She said: 'I want some money, very hard up. If you sign something I shall be able to get the money.' She wrote a letter out for me to copy. I thought I was becoming responsible for 100*l.*—but not even that, because I thought my mother guaranteed to pay the interest and would pay more than the interest so as to pay off the whole indebtedness." The 100*l.* was the only fixed sum mentioned in the letter to the moneylenders which the mother gave the daughter to copy. The judge thinks the form of the letter was prompted by Lessar. The transaction was absurd from the daughter's point of view. She had not the slightest chance of repaying this 775*l.* or indeed the 2000*l.* already charged until the grandmother's (then aged 75) death (who has already lived for two years from the date of the transaction), and her mother's death, then aged 44, and meanwhile interest at 85 per cent. on this transaction and 5½ per cent. on the Legal and General loan was running. At the date of the writ, March 4, 1933, the sum claimed by the plaintiffs was 2001*l.* 0*s.* 5*d.*, of which the daughter had nothing, and the mother 610*l.* The daughter's only chance of being able to repay the moneylenders at the grandmother's death was if her mother fulfilled her obligations as to principal and interest, and hitherto the mother had showed no sign of doing so, either as to principal or interest. The daughter says, and I think the judge accepted her evidence, that she did not understand the extent of her indebtedness. The only other advice she had was that of Mr. Naphtali Price who acted for her and her mother, and therefore was not, for her, an independent adviser. He says he advised her the interest was high, but as Mr. Price actually prepared the promissory note and memorandum and charge, and acted for the moneylenders in carrying through the transaction, I decline to accept him as an independent adviser, and entirely accept the very forcibly expressed disapproval of his action in the judgment below. The judge below speaks of "the enormity of the transaction," and I endorse that description.

The learned judge while thinking the bargain as it concerns the daughter is so unconscionable that it should be reopened and remoulded, has not felt himself able to set it aside entirely. I have carefully considered the facts in the light of the authorities cited to us (the effect of them is expressed in the judgment of Lawrence L.J., with the result of which I entirely agree) and I have come to the conclusion that, whether one approaches the matter from the point of view of undue influence exercised by the mother without the daughter's having any independent advice, a situation well known to the plaintiffs and to Mr. Price, their solicitor, or whether one approaches it from the point of view of an unconscionable bargain procured by the moneylenders without the daughter having any advice independent of her mother and of the moneylenders, the bargain is so clearly unjustifiable that it should be set aside as far as the daughter is concerned.

The Court of Chancery has always used the term " fraud " in a more extended meaning than the courts of common law, and the two meanings came into collision in the case of *Derry* v. *Peek*. (1) Long before that, in 1750, in the well known case of *Lord Chesterfield* v. *Janssen* (2) Lord Hardwicke had described two classes of transactions which equity relieved against as " frauds " in the following terms : Class 2, unequitable and unconscientious bargains " such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." " Of such," says Lord Hardwicke, " even the common law has taken notice "—namely, in the Usury Acts. Under s. 1 of the Moneylenders Act of 1900, if the Court is satisfied that the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the moneylender.

The next head of equitable fraud mentioned by Lord Hardwicke, class III, is " presumed from the circumstances

(1) (1889) 14 App. Cas. 337.

(2) (1750-1) 2 Ves. Sen. 125, 155.

and condition of the parties contracting," where a party takes "surreptitious advantage of the weakness or necessity of another: which knowingly to do is equally against conscience as to take advantage of his ignorance." Of this "fraud" Lord Hardwicke says: Equity "goes further than the rule of law; which is, that it must be proved, not presumed." The rule of law thus described still prevails in the Probate Court, where it is not enough to prove a relation between testator and beneficiary, which in the Court of Equity would require the beneficiary to displace the presumption of undue influence by proving independent advice to the testator. However, in the Court of Equity in case of a benefit or contractual advantage obtained from a person coming within certain defined relations, such as the relations of parent and young child, solicitor and client, religious superior and inferior, by the related member of that class, it is enough to prove the existence of such a relation to throw on the recipient of the advantage the burden of proving independent advice to the donor and in other respects justifying the transaction. I think on the authorities the rule of equity has become more strict than it was at first: see Ashburner on Equity (2nd ed.), 303, 304. The high water mark may perhaps be found in the judgments of Farwell L.J. in *Powell* v. *Powell* (1) and in *Howes* v. *Bishop*. (2) On the other hand the common law judges have been inclined, as Lord Hardwicke says, to rely more on individual proof than on general presumption, while considering the nature of the relationship and the presence of independent advice as important, though not essential, matters to be considered on the question whether the transaction in question can be supported. The common law view is exemplified by such decisions as that of Lords Hailsham, Sumner and Atkin in the Privy Council case of *Inche Noriah* v. *Shaik Allie Bin Omar* (3), and of Lord Alverstone C.J. and Moulton L.J. in *Howes* v. *Bishop*. (4) Fortunately, in view of the undisputed facts of this case I do not find it necessary to discuss further which view should as a general rule prevail.

(1) [1900] 1 Ch. 243.
(2) [1909] 2 K. B. 390, 399.
(3) [1929] A. C. 127.
(4) [1909] 2 K. B. 395, 399.

The only contention I think necessary to touch upon is the argument of respondents' counsel that though the relationship of mother and young daughter raises a presumption of undue influence which must be displaced by the beneficiary, that presumption is conclusively rebutted by what is called the "emancipation" of the daughter by marriage. I should be very reluctant to lay down any such general rules. A daughter married at 18 years of age may go and live with her husband in her mother's house and may at the age of 21 be deprived of all her property by their joint influence without independent advice. She may at the age of 22 be separated from her husband and return to her mother's house. Such cases should be dealt with on their own facts, and not on any general presumptions. I find it unnecessary in this case to investigate the relative merits of the differing judicial views, for on the undisputed facts before us it appears to me that both the undoubted influence of the mother over the daughter, the complete absence of justification of the terms of the bargain as against the daughter and the absence of any independent advice to the daughter, her only advice being that of the solicitor to the moneylenders and to her mother, show that without considering any questions of burden of proof the transaction as against the daughter cannot be supported by the plaintiffs, the moneylenders.

The daughter had been induced to borrow and to give a charge on her interest in remainder for 2000*l.*, the benefit of the whole of which, except 100*l.*, would go to the mother. This transaction was initiated by her mother before her daughter came of age, and carried through by a solicitor introduced by the moneylenders, Barclay's Trust, who were to be repaid, out of the money borrowed, the debt owing by the mother, for which money could not be obtained without the daughter's making herself liable and giving a charge on all her expectant property. The daughter had no means to pay either principal or interest as it came due, and risked the loss of all her expectations. A year later she is again induced by her mother with the advice of the same solicitor, now connected with other moneylenders, the present plaintiffs, again to become responsible for 775*l.* at 85 per cent. interest. She received none of the 775*l.* She had no means of paying principal or interest when it became due, and the risk of total loss of any remaining value of her expectant interest was imminent.

On these grounds I am of opinion that the personal liability of the daughter for the loan in question in this case and the charge of August 5, 1931, on her property for that loan cannot be supported, and that her appeal should be allowed.

A similar result in my opinion would follow from a point raised by the daughter on the validity of the memorandum which under s. 6 of the Act of 1927 is essential to the enforcement of any moneylending agreement. The real facts are that on July 3, 1931, the moneylenders purported to have lent the mother the sum of 500*l.* I assume for the moment that this was true, but I refer later to the way that sum of 500*l.* was arrived at. The 500*l.* was due for repayment on October 3, 1931, with interest then for the first time due at the rate of 85 per cent. On August 5, 1931, nothing was in fact or law due on the promissory note. But it was said that on that day the mother agreed that 575*l.* was on that day due. The book entry at the time showed 525*l.* repaid, and the document delivered by the moneylenders on February 22, 1933, under their statutory obligation to give information under s. 8 of the Act of 1927, stated that 525*l.* was repaid on August 5, 1931. The moneylenders said that 525*l.* was the mistake of a clerk which they had not discovered. I will assume that the mother had agreed to treat the amount as being due on August 5, though if it was assumed that the principal was repaid on that date with interest at 85 per cent. to the date of repayment the true amount would only be between 535*l.* and 540*l.*, an extra charge of some 40*l.* being levied. The result is that the memorandum, which states: "I [the mother] agree and acknowledge that the amount now owing by me to you in respect of the promissory note . . . . is 575*l.*, which sum I agree to treat as a present liability," does not state the real transaction. No amount was then owing on the promissory note; if it was supposed that the principal plus appropriate pro rata interest was then to be paid, the amount would be less than 540*l.*, and there would be a bonus to the moneylender for accepting repayment before it was due of some 40*l.* In my opinion this transaction should be stated on the memorandum in such a way as to show the borrower that she was agreeing to pay a sum which was not due by allowing it to be deducted from the sum for which she was making herself liable. The judge below has held himself bound to hold the memorandum accurate by our decision in *B. S. Lyle, Ld.* v. *Chappell.* (1) The facts in that case were that a former loan was due for repayment. The moneylender renewed it and made a fresh loan, and described the total of the sum due and the new loan as money advanced under an agreement to borrow. We held, following *Spargo's* case (2) and the principles stated by Lord Cozens-Hardy M.R. in *Parsons* v. *Equitable Investment Co.* (3), that the transaction was truly stated. But in that case the previous loan was due for repayment at the time of the transaction described. But Lord Cozens-Hardy stated the result of the authorities thus (4) : " In the third place, this doctrine has no application unless the amount retained is at the time due and payable . . . . In the fourth place, the retention by the bill of sale holder of moneys not yet due is, in the language of Fry L.J. in *Richardson* v. *Harris* (5) the taking of a bonus ' which does not appear on the statement of the consideration.' In the present case it seems to me that the defendants have done exactly that which in *Richardson* v. *Harris* (5) this Court said could not be done, and on that ground I think the bill of sale is void." I think these remarks apply to the memorandum in a moneylender's transaction as well as to the statement of consideration in a bill of sale. In the present case the loan was in fact not yet due for repayment, and the moneylender was in fact getting an additional payment or bonus for accepting repayment before it was due. In my view this should appear on the face of the memorandum, and should not be left to be discovered by the lady, the borrower, by working out arithmetical calculations as to what might be due on the promissory

(1) [1932] 1 K. B. 691.
(2) (1873) L. R. 8 Ch. 407.
(3) [1916] 2 Ch. 527.
(4) Ibid. 530.
(5) (1889) 22 Q. B. D. 268, 276.

note if the sum secured was to be taken to be due at a date on which it was not due. The effect of the transaction seems to be that the moneylender treating a sum as due for interest at 85 per cent. which was not due proceeds to get interest on interest. This seems to be illegal under s. 7 of the Act of 1927, as the alleged agreement "provides directly or indirectly for the payment of compound interest," and strengthens the conclusion that the real facts as to such an agreement should appear on the face of the memorandum which should state the true transaction.

The transaction against the daughter is therefore void for want of an accurate memorandum of the transaction. I think that the memoranda of the loans of May 28, 1931, and July 3, 1931, were bad for the same reason. In neither of them was the sum deducted on repayment due under the promissory note at the time it was deducted.

The mother, however, has not appealed against the decision of the judge who, while reopening the transaction, remoulds it against her by treating her as liable for 610*l*. cash received and interest at 40 per cent. till August, 1931, and 12 per cent. after the security of the daughter was added. The moneylender does appeal against the rate of interest and the order as to costs, and in my opinion, as this Court is depriving the moneylender of the security given by the daughter's obligation, the terms against the mother should be varied by making the interest run throughout at 40 per cent. As the moneylender was asking for 85 per cent. throughout I see no reason to give him any costs in his appeal against the mother.

The judgment of the Court will be in the form to be read by Lawrence L.J.

LAWRENCE L.J. The first and main question on this appeal is whether the appellant (hereinafter referred to as "the daughter") is entitled to have the transaction entered into by her with her mother and the respondents set aside on the ground of the undue influence exercised by her mother of which the respondents had knowledge or notice.

The principles upon which this question falls to be decided are not in doubt. Any difficulty there may be in this case lies in the application of those principles to the facts.

It is of course not disputed that the case of parent and child is one of the class to which the doctrine established by the leading case of *Huguenin* v. *Baseley* (1) applies. " A man of mature age and experience can make a gift to his father or mother because he stands free of all over-riding influence except such as may spring from what I may call filial piety : but a young person (male or female) just of age requires the intervention of an independent mind and will, acting on his or her behalf and interest solely, in order to put him or her on an equality with the maturer donor who is capable of taking care of himself "—per Farwell J. in *Powell* v. *Powell*. (2).

In cases of this kind it must be remembered that the question is not merely whether the son or daughter knew what he or she was doing, had done, or was proposing to do, but how the intention was produced (per Lord Eldon L.C. in *Huguenin* v. *Baseley*. (3) )

What the parent has to prove in order to uphold the gift is, first, that the child knew and understood what it was that he or she was doing and, secondly, that his or her disposition to do it was not produced by undue influence : per Sir John Romilly M.R. in *Hoghton* v. *Hoghton*. (4)

The jealousy of the Court arises in every case where a parent takes a substantial benefit from a child and even when it finds that the child intended the transaction to take effect according to its tenour considers carefully how that intention was produced. " Influence is a thing which is assumed as between father and child—not that the influence is assumed to be unduly exercised, but the influence is assumed, and it is then thrown upon the father, if he takes any benefit, to prove what is called the righteousness of the transaction, and the Court has to see that every proper protection was thrown around the child, and that the child has deliberately and advisedly, and under protection, done that by which his father has obtained a benefit "—see per Lord Hatherley L.C. in *Turner* v.

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(1) 14 Ves. 273.
(2) [1900] 1 Ch. 243, 246.
(3) 14 Ves. 273, 300.
(4) (1852) 15 Beav. 278, 299.

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*Collins.* (1) These observations, in my opinion, are equally applicable to the case of mother and daughter.

It is impossible to lay down any hard and fast rule for determining how the onus, which admittedly lies upon a parent, of proving that a gift from his or her child was not due to the parental influence, can be discharged. Each case must depend upon its own special circumstances; in some cases the parental dominion may be stronger and last longer than in others; it is plain that it does not necessarily come to an end on the technical legal emancipation of the child and it is well settled that as long as the parental dominion continues the exercise of influence will be presumed to continue also. As Barton J. very justly said in *M'Mackin* v. *Hibernian Bank* (2), the law protects young persons of an impressionable age when gratitude, affection, and respect for a parent are fresh and strong, not by curtailing their capacity to deal with others, but by binding the consciences of those who deal with them.

The respondents' main contention in the present case was that as the daughter had married and left her home four years before the transaction in question there could be no presumption of undue influence and the doctrine of *Huguenin* v. *Baseley* (3) had no application. Mr. Grant, however, was constrained to admit that the bare fact of the marriage of a daughter was not sufficient to exclude the application of the doctrine, as after her marriage the daughter might continue to live with her parents and remain subject to their dominion, but he contended that the marriage of a daughter coupled with her departure from home necessarily put an end once and for all to the dominion of her parents, and consequently in such a case the doctrine of *Huguenin* v. *Baseley* (3) was inapplicable.

In my judgment that is putting the proposition too high. The fact that a daughter has married and gone to live with her husband is no doubt a circumstance of great importance in determining whether or not the dominion of a mother

(1) L. R. 7 Ch. 329, 339.

(2) [1905] 1 I. R. 296, 304.

(3) 14 Ves. 273.

over her daughter has completely terminated, but it is not conclusive. The relationship between a mother and her daughter is undoubtedly one of the greatest intimacy and confidence, and it is impossible to lay down any general rule for measuring the amount or duration of the dominion which a mother may have acquired over her daughter. I can readily imagine cases in which a husband might truthfully assert that the parental dominion of his mother-in-law over his wife had continued for a considerable time and to a considerable extent after the marriage, and, for aught I know to the contrary, it may be that in the present case the continuance and exercise of that parental dominion was a contributory factor to the estrangement between the daughter and her husband. Be that as it may, however, I am of opinion that the true answer to the respondents' contention is that it is a question of fact depending on the particular circumstances of each case whether or not the parental dominion has completely ceased to exist, and that there is no hard and fast rule that in every case where a daughter has married and left the home of her parents the parental dominion must necessarily be taken to have completely ended.

Mr. Grant stressed the fact that no case is to be found in the reports where in such circumstances a daughter has been held to be under the dominion of her mother. The absence of any such reported case, however, does not, in my opinion, prevent the Court, if the circumstances warrant it, from coming to the conclusion that a mother's dominion had not completely ceased although the daughter had married and left her home.

I do not propose to recapitulate the facts which were proved or admitted at the trial; they are already sufficiently stated in the judgments of the trial judge and of Scrutton L.J. Nobody on learning those facts can fail to be struck by the utter helplessness of the daughter both during her married life and at the time when she entered into the transactions now in question. She had married, at the early age of eighteen, a husband who did not earn enough to keep her and her children, who was addicted to drink, and with whom she was soon on bad terms. Her mother to whom she was much attached, and with whom she had kept in close contact ever since her marriage, was the only person to whom she could turn for assistance and advice. In these circumstances it is not surprising that the mother should have retained a large measure of dominion over her daughter after her marriage and therefore been in a position to exercise her parental influence by procuring the daughter to help her in obtaining money for herself.

In my judgment the only reasonable explanation of the daughter's unquestioning compliance with her mother's demands, although she was thereby jeopardising, if not altogether sacrificing, her entire fortune, is that the mother's dominion over her had not determined but was still continuing when she entered into the transaction now in question. The letter of July 31, 1931, which the mother got the daughter to copy and send to the plaintiffs, bears on the face of it evidence of the continuance of the mother's dominion. To put it at the lowest, the respondents have failed to prove that the daughter had at the relevant time become completely emancipated from the dominion of her mother.

Assuming that I am right in arriving at that conclusion the next question which arises is whether the evidence adduced at the trial establishes that the presumption of undue influence has been rebutted.

In *Allcard* v. *Skinner* (1) Cotton L.J. stated that what has to be proved to rebut the presumption is that the gift was "the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the Court in holding that the gift was the result of a free exercise of the donor's will." The learned lord justice goes on to explain that in this class of cases "the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

(1) 36 Ch. D. 145, 171.

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In the case in the Privy Council of *Inche Noriah* v. *Shaik Allie Bin Omar* (1), the Board (consisting of Lord Hailsham L.C., Viscount Sumner and Lord Atkin) approved of the passage from Cotton L.J.'s judgment which I have just cited, and (differing in this respect from the decision of Farwell J. in *Powell* v. *Powell* (2) ) held that independent legal advice is not the only way in which the presumption can be rebutted, and, further, that it may be rebutted by proving independent legal advice although that advice was not taken. The judgment then proceeds as follows (3): "It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Cotton L.J., and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor."

Accepting this passage as containing the rule which the Court ought to act upon in the present case I have come to the clear conclusion that it has not been proved that the transaction in question was the spontaneous act of the

(1) [1929] A. C. 127.
(2) [1900] 1 Ch. 243.
(3) [1929] A. C. 135.

daughter acting under circumstances which enabled her to exercise an independent will and which justify the Court in holding that the transaction was the result of a free exercise of the daughter's will, within the meaning of the statement by Cotton L.J. in *Allcard* v. *Skinner*. (1)

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The transaction so far as the daughter was concerned originated with a request by her mother for assistance in raising further money of which she (the mother) was in urgent need. The mother seems to have taken it for granted that she could get the daughter to comply with her request as she had already arranged with Mr. Lessar that the daughter should guarantee the fresh loan, and it never seemed to have occurred to the daughter to do otherwise than accede to whatever her mother asked her to do, although she obviously did not understand what she was letting herself in for. The last thing the mother seems to have thought of was that it was her duty to safeguard her daughter's interests and to see that she had proper protection thrown around her before further involving herself and her fortune in her mother's transactions with moneylenders. In the circumstances of this case I think it was essential that the daughter, before committing herself to a fresh inroad on her already diminished fortune, should have had the protection of some independent legal adviser who could have explained fully to her the position in which she already was placed owing to her having mortgaged her reversion and the disastrous consequences of entering into the proposed transaction. It is not suggested that the daughter had any such legal advice or indeed any independent advice at all. The only so-called advice which the daughter received was from Mr. Price, of whose conduct in connection with this and the earlier transaction in which he acted as solicitor for the daughter I find it difficult to speak with becoming moderation. In 1930, Mr. Price, whilst ostensibly acting for the daughter (who had only just attained the age of twenty-one years), actively assisted the mother and certain moneylenders who were clients of his in procuring the daughter to raise for their

(1) 36 Ch. D. 145, 171.

benefit a sum of 2000*l.* on the security of a mortgage of her reversionary interest under her grandfather's will and certain policies which the lenders required her to take out. The reversionary interest so mortgaged was the sole fortune of the daughter; she had no means whatever with which to pay the interest on the loan, or the premiums on the policies, or the capital sum secured when it fell due. Of this loan she only received 100*l.*, the rest went to the moneylenders and to her mother. One of the deeds which, under Mr. Price's advice, the daughter executed on this occasion contained a recital that her mother had agreed to covenant not to exercise her testamentary power of appointment under the grandfather's will so as to reduce the daughter's share below a certain amount "for the purpose of making a provision for the daughter," whereas to the knowledge of Mr. Price this was untrue, the sole purpose of the covenant being to enable money to be raised for the benefit of the moneylenders and the mother. A more improvident transaction from the daughter's point of view it is difficult to conceive. In my judgment it affords cogent evidence that at that time she was still under the influence of her mother and in the absence of any evidence to the contrary I decline to presume that this influence no longer existed when some eighteen months afterwards (again with Mr. Price's assistance and again for the benefit of the mother and the moneylenders) the daughter entered into the transaction now in question, which was rightly described by the learned judge as "a bargain into which . . . . no person of intelligence and experience could have been induced to enter."

Moreover, the evidence has satisfied me that the transaction was never properly explained to the daughter and that she did not fully understand what she was doing. Any explanation which Mr. Price says he gave to the daughter seems to have been merely formal and perfunctory, and from first to last Mr. Price seems to have considered it unnecessary to explain fully to her the true nature and effect of her entering into the guarantee, and the serious consequences which might ensue to her if (as was practically certain to happen) her mother were to make default. It took learned counsel some considerable time to make the Court understand the true nature of the transaction, and the learned judge found that Mr. Price said nothing to draw the daughter's attention "to what many solicitors might have thought to be the enormity of the transaction." In using this expression, which I think was amply justified, I have no doubt the learned judge had in mind both the harsh and unconscionable nature of the transaction as between the mother and the moneylenders and also the fact that it would almost certainly result in a very short time (as in fact it did) in a claim by the moneylenders against the daughter for a very large sum of money, which of course she had no prospect whatever of being able to pay, with the inevitable consequences that she would lose the remnant of her fortune which had been left over after the earlier transaction in 1930. Whilst considering how to carry out the transaction for the benefit of the mother and the moneylenders Mr. Price seems to have entirely ignored or neglected the interests of the daughter.

In these circumstances I am clearly of opinion that any advice given by Mr. Price to the daughter, besides not being independent, was not such as a competent and honest adviser would have given if acting solely in the interests of the daughter.

So far as the respondents are concerned it is plain that they knew or had notice of all the relevant facts, Mr. Lessar stated that he understood that the daughter was living apart from her husband. It does not appear who told him this, but I have little doubt that when it was proposed that the daughter should guarantee the loan Mr. Lessar desired to be assured that her husband would approve and was told by the mother that her daughter and her husband were estranged, and that Mr. Lessar took this to mean that they were living apart. He knew, therefore, that the daughter was not receiving any protection or advice from her husband and he further knew that she was dependent on her mother for the amount of her reversion as he had obtained a copy of the grandfather's will some time before. The more material fact, however, is that Mr. Price acted as solicitor for the respondents as well as for the mother and the daughter in completing the transaction, and that as such solicitor he knew or ought to have known all the relevant facts as to the relationship existing between the mother and the daughter and that the latter had had no independent advice.

The learned judge, after alluding to the fact that the respondents had stated that at the time of the transaction in question they had ceased to regard the mother as a person to whom it was safe to lend money, said: "it results that they were permitting, if not inducing, a young woman, with little experience of her own and with no one to advise her except an extravagant and unbusinesslike and not disinterested mother and a solicitor whose position disqualified him from offering independent advice, to enter into a transaction the whole burden of which they anticipated would fall on her. It was a bargain into which they must have known that no person of intelligence and experience could have been induced to enter."

In these circumstances I am of opinion that the respondents are in no better position than the mother would have been in had the daughter assigned her reversion directly to her instead of to the respondents for her benefit, in which case I do not think that it is open to reasonable doubt that the Court would have set aside the transaction.

The only remaining question to be considered on this branch of the case is that raised by the amendment of the respondents' reply, pursuant to the leave granted by this Court—namely, that the daughter, with full knowledge of the facts and after being separately advised, acquiesced in and elected to be bound by the transaction, and, further, that by reason of such acquiescence and election, the respondents gave the mother time which enabled her to give a bill of sale upon her furniture and thus deprive the respondents of the benefit of any judgment they might have secured against her, with the result that the daughter was estopped from relying on the invalidity of the transaction. The only evidence relied upon by the respondents in support of this contention is the correspondence which passed between the solicitors who were eventually consulted by the mother on behalf of herself and her daughter and the solicitors representing the respondents.

I do not propose to go through this correspondence but will content myself by stating that the evidence shows that the daughter knew little of what was going on, and, moreover, after having carefully read the correspondence, I have been unable to find anything more in it than negotiations to settle the respondents' claim, and nothing which would justify the respondents in arriving at the conclusion that the daughter had elected to ratify the transaction or had abandoned her right to have it set aside. In these circumstances it is perhaps not to be wondered at that that the respondents did not plead acquiescence or ratification in their original reply, but only introduced that plea as an afterthought.

In view of the conclusion that I have reached on the main question it is unnecessary for me to express any opinion on the point taken by Mr. Sullivan that the daughter was misled by her mother as to the extent of the obligation she was to undertake under her guarantee, or on the further point that the transaction cannot stand because the respondents have not complied with the provisions of the Moneylending Acts.

The order of this Court will be :

Allow the appeal of the defendant A. J. Black, with costs; dismiss the plaintiffs' cross-appeal against the defendant A. J. Black, with costs.

Order that so much of the judgment of du Parcq J., dated May 19, 1933, as adjudged (1.) that the plaintiffs do recover against the defendant A. J. Black the sum of 764*l.* 6*s.* 10*d.*; (2.) that judgment be for the plaintiffs on the counterclaim of the defendant A. J. Black; and (3.) that the defendant A. J. Black do recover 5/6ths of her costs of claim and counterclaim be set aside and in lieu thereof

Order that the action do stand dismissed as against the defendant A. J. Black, with costs.

On the counterclaim of the defendant A. J. Black declare that the promissory note and mortgage, dated August 5, 1931, in the pleadings mentioned are void as against the defendant A. J. Black and order the same to be delivered up to her for cancellation, and

Order that the defendant A. J. Black do recover the costs of the counterclaim against the plaintiffs.

On the appeal of the plaintiffs against the defendant A. L. Black order that the judgment of du Parcq J. be varied by substituting interest at the rate of 40 per cent. for interest at the rate of 12 per cent. on the sum of 610*l.* therein mentioned as from August 5, 1931, and by increasing the sum to be recovered against the defendant A. L. Black accordingly, and order that the plaintiffs recover no costs of this appeal against the defendant A. L. Black.

GREER L.J. The problem presented in the appeal of Mrs. A. J. Black (hereinafter referred to as "the daughter") calls for the application of certain principles of law established by the decisions of Courts of Equity to the facts proved at the trial. The following principles of law seem to me to be well established :—

1. In the case of certain relationships involving trust and confidence by one person in another the law requires that the Court shall presume that a gift or voluntary settlement or obligation entered into without consideration in favour of the party in whom trust or confidence is placed by the other party to the transaction has been induced by undue influence.

2. The relationship of parent and child is one of the relationships to which the presumption applies.

3. The presumption continues to apply after the child has come of age for a period which has not been defined by the decisions, but has been referred to in some of the decisions as either just after or in a short time after the child has come of age.

4. The presumption ceases to apply if it be proved that the child has been emancipated from the relationship which gives rise to the opportunity for the exercise of undue influence, i.e.,

a relationship in which trust and confidence is placed on the good faith and integrity of the parent when the latter is exercising his or her influence as a parent.

5. The presumption may be rebutted by proving that the gift or instrument whereby benefits are conferred on the parent by the child is the result of " the pure, voluntary, well understood, acts " of the child's mind. I have quoted these words from the judgment of Lord Eldon in the leading case of *Huguenin* v. *Baseley*. (1)

It is a moot question on which judges have differed whether in order to rebut the presumption it is necessary that the child should have independent advice. Turner L.J. in *Rhodes* v. *Bate* (2) said : " I take it to be a well established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." There are other authorities in decisions of Chancery judges to the same effect : see especially the view expressed in the judgment of Farwell J. in *Powell* v. *Powell*. (3) There are, however, expressions of opinion the other way, the most important of which are those contained in the judgment of the Privy Council in *Inche Noriah* v. *Shaik Allie Bin Omar*. (4)

In support of the principles Nos. 1 to 5 it will be sufficient to quote the opinion of Lord Langdale M.R. in *Archer* v. *Hudson* (5) : " Nobody has ever asserted that there cannot be a pecuniary transaction between a parent and child, the child being of age, but everybody will affirm in this Court, that if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete ' emancipation,' without any benefit moving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child, and that it is the business and duty of the party, who endeavours to maintain such a transaction, to show, that the presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear. This Court does not interfere to prevent an act even of bounty between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control."

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(1) 14 Ves. 273, 296.
(2) L. R. 1 Ch. 252, 257.
(3) [1900] 1 Ch. 243.
(4) [1929] A. C. 127.
(5) 7 Beav. 551, 560.

Somewhat similar words were used by Knight-Bruce L.J. in the case of *Wright* v. *Vanderplank*. (1) The following words are quoted from the Law Journal report. There the Lord Justice refers to "the close attention, the rigid strictness, and the watchful jealousy with which, on principles of natural justice and upon considerations important to the interests of society, the law of this country examines, scrutinizes, and if I may borrow an old expression, 'weighs in golden scales' every transaction between a guardian and a ward, or between a parent and child, which, including or consisting of a gift from the younger to the elder, takes place so soon after the termination of the legal authority, so that the ward or child may, in consequence, probably not be in the largest or amplest sense, not in mind as well as in person, an entirely free agent."

What is meant by "emancipation" has never been defined in any of the reported decisions. It was contended on behalf of the respondents that as soon as a daughter is married and leaves the parental home that in itself amounts to emancipation, which puts an end to any presumption of undue influence by a parent. I do not agree with this view. I think emancipation from the relationship which gives rise to the exceptional influence possessed by a parent over a child is a question of fact to be determined on the evidence given in each case. Instances have been given in Lawrence L.J.'s judgment of circumstances where it would be wrong to infer emancipation

(1) 8 De G. M. & G. 133, 137; 25 L. J. (Ch.) 753, 755.

merely from marriage. The influence arising out of the relationship of mother and daughter is, in my judgment, one in which it is most likely that the influence of the mother in persuading the daughter to take a certain line of action will have a greater effect, and will continue to operate for a longer period than in the case of influence arising from any other relationship.

In my judgment the evidence in this case establishes that the mother continued to exercise over her daughter the power which her relationship gave her to persuade her daughter to say "yes" to any course of action, however much it was against the interests of the daughter and for the benefit of the mother. I have accordingly come to the conclusion that the daughter's signatures to the agreement with the plaintiffs, to the promissory note in their favour, and to the security given by her on her reversionary interest in the estate of her grandfather were procured by the influence of her mother at a time when she, the daughter, had not been "emancipated" within the meaning of the decisions, and I am further of opinion, for the reasons stated in the judgments of Scrutton and Lawrence L.JJ., that there was nothing in the evidence which justifies a decision that the presumption has been rebutted. I am also of opinion that as the plaintiffs, through Mr. Lessar, had notice of the relationship between the two defendants, and of the influence that had been exercised by the mother on the occasion of the mortgage to the Legal and General Assurance Co., and as Mr. Price was the solicitor of the mother and the daughter to the knowledge of Mr. Lessar, and was also, in completing the transaction, the solicitor of the plaintiffs, the plaintiffs must be treated as having notice of the facts which constituted undue influence on the part of the mother. I agree with Lawrence L.J. with regard to the alleged ratification.

Having regard to these findings I think it unnecessary to express any opinion on what I think is a very difficult question, namely, whether the memorandum signed by the daughter and her mother was a sufficient memorandum to comply with s. 6 of the Moneylenders Act, 1927.

I also agree with my lords with regard to the cross-appeal in the daughter's case, and the appeal in the mother's case, and as to the order to be made by this Court.

*Appeal of the daughter allowed.*

Solicitors for moneylenders: *Philip Goodenday & Co.*
Solicitors for daughter: *Lazarus, Son & L. A. Hart.*
Solicitors for mother: *Forsyte, Kerman & Phillips.*

R. F. S.

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## SUTHERLAND *v.* ADMINISTRATOR OF GERMAN PROPERTY.

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*Nov.* 29, 30.

*Shipping—Bill of Lading—Marine Insurance—Payment for total Loss by insurers, German Nationals in United States—Subrogation—Recovery of damages in England by insurers from English shipowners—War Legislation—Vesting of insurers' property in Alien Property Custodian for United States—Seizure of Bills of Lading by Custodian—Situs of chose in action.*

In February, 1912, three parcels of goods were shipped in a British steamship from Baltimore for Hamburg. The ship sailed and was never heard of again. The goods were insured with M., who were German nationals carrying on business in New York. The assured claimed against M., and some time before November, 1918, were paid by M. for a total loss; whereupon the bills of lading were handed over to M. by the assured.

Actions on the contract of carriage against the shipowners were commenced in England for the benefit of M. and other insurers by the owners of the goods and damages were recovered, of which the sum of 4538*l.*, being that portion which corresponded with M.'s share in the insurance, was claimed by the defendant to be subject in his hands to the charge created by the Treaty of Peace Order, 1919. On November 18, 1918, after the outbreak of war between the United States and Germany and after proceedings had been commenced in England, the plaintiff, in pursuance of the American Trading with the Enemy Act, 1917, and executive Orders made thereunder, made a demand upon M. the effect of which was to vest in him as Alien Property Custodian all the property, rights, claims and assets of M. within the United States.

In an action by the plaintiff claiming payment by the defendant of the said sum of 4538*l.* so recovered by M. and in the hands of the defendant as Administrator of German Property:—

*Held*, (1.) that on the crucial date, November 18, 1918, M. had by subrogation an equitable interest as against the owners of the goods in

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the right of action which those owners had for the loss of their goods to the extent that was necessary to recoup to M. the amount paid on the policies of insurance; (2.) that that right of action came within the general rule that choses in action must be taken to be situate in the country where they are properly enforceable; (3.) that, notwithstanding the fact that the bills of lading and other documents relating to the claim against the shipowners were at the material time in the hands of the plaintiff in the United States as Alien Property Custodian, the situs of the right of action was in England, and therefore that the sum recovered for M. therein passed to the defendant and not to the plaintiff.

Decision of Clauson J. affirmed.

APPEAL from a decision of Clauson J., sitting as an additional judge of the King's Bench Division.

The plaintiff, as Alien Property Custodian for the United States of America, claimed a sum of 4538*l.* in the hands of the defendant in this country.

In February, 1912, three parcels of goods, two of which consisted of agricultural machinery and the third of bales of cotton, were shipped at Baltimore (U. S. A.) on the British steamship *Mount Oswald* under bills of lading issued on behalf of the shippers for the delivery of the goods at Hamburg to the respective consignees therein named; those respective consignments for convenience being hereinafter referred to as "consignments A, B and C."

The ship sailed on February 12, 1912, and was never heard of again.

Those several parcels of goods were insured by their respective owners with the Mannheim Insurance Company (hereinafter referred to as "Mannheim"), German nationals with a branch business in New York.

In 1912 the assured claimed against Mannheim in respect of the loss of the goods, and at some time before November 18, 1918, were paid by them as for a total loss, and in each case, upon such payment, the bills of lading indorsed so as to represent and pass the property in the goods were, together with the invoices, delivered up by the assured to F. Hermann & Co., who managed Mannheim's business in New York. At the same time, in the case of consignments A and B, there were also transferred to Mannheim undertakings in writing signed by the owners of the goods comprised in those consignments to refund to Mannheim any sum recovered from the carriers or bailees of those goods in respect of their loss.

On July 24, 1913, F. Hermann & Co. on behalf of Mannheim sent the bills of lading and invoices relating to consignments A and B, to Messrs. Bigham & Co., counsellors-at-law in New York, with the view to proceedings being taken on behalf of Mannheim to recover damages for the loss of the goods comprised in those consignments. In January, 1918, Messrs. William A. Crump & Son, solicitors in London, were instructed on behalf of Mannheim to take proceedings in England with the same object.

After the outbreak of war between the United States and Germany and when proceedings in England were pending for the recovery of damages for the loss of consignments A and B, the plaintiff, as Alien Property Custodian in U. S. A., on November 18, 1918, in pursuance of the Trading with the Enemy Act, 1917 (U. S. A.), and Executive Orders made under the authority of that Act (1), made a demand upon Mannheim to transfer and deliver up to him all and singular the property, rights, claims, interests, effects and assets held for or for the benefit of Mannheim; the effect of which demand was, he said, to vest in him as Alien Property Custodian such right, title, interest and estate in and to and possession of the money or other property so demanded. Shortly after, and in pursuance of, the demand, the bill of lading relating to consignment C, then actually in the hands of Mannheim, was handed over by them to the plaintiff.

On January 10, 1919, the plaintiff was, in pursuance of the American Trading with the Enemy Act, 1917, s. 6, appointed manager of Mannheim's assets and directed to collect and pay over to the liquidator of enemy insurance companies claims, including subrogation claims, and to prosecute actions then pending and institute actions either in his own name or in

(1) By the Act of 1917 and executive Orders made thereunder money and property in the United States due or belonging to an enemy was to vest in the Alien Property Custodian, and a demand by him for the transfer or delivery to him of such money or property, including choses in action, was to have the effect of vesting these in him.

the name of Mannheim for the enforcement of Mannheim's rights.

On October 22, 1919, Messrs. Bigham & Co., of New York, sent the bills of lading and other documents in their hands which related to consignments A and B to Messrs. William A. Crump & Son in London for the purpose of prosecuting in England the claims of Mannheim and other insurers for damages for the loss of the goods comprised in those consignments. On September 22, 1923, the bill of lading and other documents relating to consignment C, which had been seized by and were then actually in the hands of the plaintiff, were sent by the plaintiff to Messrs. William A. Crump & Son in London for the purpose of taking legal proceedings in respect of the loss of the goods comprised in that consignment.

Several actions on the contracts of affreightment were commenced in England by the respective owners of the goods lost, on behalf of the insurers, against the owners of the *Mount Oswald*, and in a test action, the writ in which was issued on October 13, 1923, the claims were eventually compromised, the defendants paying in respect of the various claims, which totalled 41,685*l.*, a sum of 37,590*l.*, of which the sum of 4538*l.* formed the proportionate part which corresponded with Mannheim's share in the insurance.

The defendant having intimated to the plaintiff his intention of crediting the German Clearing Office with the sum of 4538*l.* in his hands as Administrator of German Property, unless the plaintiff should obtain the decision of an English Court in favour of his, the plaintiff's, claim to that sum, this action was, accordingly, commenced by the plaintiff claiming a declaration that that sum was not and never had been subject to the charge under Art. I., cl. (xvi.), of the Treaty of Peace Order, 1919, and that he, the plaintiff, was entitled to be paid that sum.

Clauson J. held (1.) that on November 18, 1918, Mannheims had by subrogation an equitable interest as against the owners of the goods in the right of action which those owners had for the loss of the goods to the extent that was

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necessary to recoup them in respect of the amount paid to those owners; (2.) that that right of action and the equitable interest therein of Mannheims must be taken to be situate in the country where they were properly enforceable, namely England, and therefore (3.) that the action failed.

The plaintiff appealed.

*H. I. P. Hallett* and *Stephen Chapman* for the appellant. By the Treaty of Peace Order, 1919, Art. I., cl. (xvi.), "all property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force [i.e., January 10, 1920] . . . . and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged" in the way there set out. The question, therefore, is whether the money now in question was within His Majesty's Dominions belonging to an enemy national on January 10, 1920. We submit that on that date it was not within His Majesty's Dominions vested in an enemy national; it was vested in the appellant, the Custodian of Alien Property for the United States. It will no doubt be contended that *Administrator of German Property* v. *Russian Bank for Foreign Trade* (1) is opposed to this view. There the action was in respect of a bill of exchange which was addressed to the Russian Bank for Foreign Trade in London and was accepted by it payable at another bank in London. The bill was presented there and was dishonoured. In that case, it will be observed, there was a definite localization of the place of payment—namely, in London. That distinguishes that case from this. Further, there was there no conflict between two administrators of enemy property. In this case it was in the United States that the "property right and interest" could be effectively dealt with, inasmuch as all the material documents were there: see the decision of the Supreme Court of Canada in *Secretary of State of Canada and Custodian* v. *Alien Property Custodian for the United States.* (2) Payment by Mannheim was an acceptance of abandonment of the thing insured, and all proprietary interest therein passed to them, and from them to the appellant. In *In re Clark* (1) Farwell J., in determining the locality of certain shares, said : "The property I have to deal with is a share, and that is represented by a certificate without which no transfer can take place. The actual effective transfer can be done equally effectually in South Africa or in England, and the only conceivable distinction that I can discover in point of locality is the possession of the certificate which for this purpose is essential to complete the title to the shares." See, too, per Buckley L.J. in *Winans* v. *Rex* (2), where he said : "It has long ago been laid down that, while a simple contract debt is situate where the debtor is, a specialty debt is where the instrument happens to be." These observations strongly support our contention. Clauson J. was therefore wrong in holding that all that Mannheim took was a mere equitable right in a fund, relying for that on *Public Trustee* v. *Wolf.* (3) We say Mannheim took much more ; they took the interest of the assured in whatever might remain of the subject-matter insured, and all proprietary rights incidental thereto : see s. 63 of the Marine Insurance Act, 1906.

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(1) Unreported. Decided by the Court of Appeal (Scrutton, Greer and Sankey L.JJ.) on March 15, 1929.

(2) [1931] S. C. R. 169.

[Reference was made to Dicey's Conflict of Laws, Rule 76, and Appendix, Note 29.]

*Sir Donald Somervell S.-G.* and *Wilfrid Lewis* for the respondent were not called upon.

SCRUTTON L.J. This case, like many others arising out of war legislation, raises some extremely complicated questions ; but by good fortune we are sometimes able to find a short way of dealing with them, and in the present case I have found a short way of disposing of the point. I say that without in the slightest degree intending to disparage the careful argument of Mr. Hallett, but in my view we are bound by our previous decision in *Administrator of German Property* v. *Russian Bank for Foreign Trade* (4), in which a very similar point was raised.

(1) [1904] 1 Ch. 294, 298.
(2) [1908] 1 K. B. 1022, 1030.
(3) [1923] A. C. 544.
(4) Unreported.

The plaintiff is the Alien Property Custodian for the United States and the defendant is the Administrator of German Property in England, and the question is, which of them is entitled to the benefit of a sum of money recovered in an action in England against English shipowners. The case arises in this way: twenty-one years ago, a ship, owned by British subjects resident in the United Kingdom, sailed from Baltimore for Hamburg, having on board cargo, including three parcels, two of them of agricultural machinery and the third of cotton, all consigned to Germans or Hungarians. Shortly after leaving Baltimore the ship went to the bottom, and the agricultural machinery and cotton have been there for twenty-one years and probably would not now be worth much even if they could be recovered. These parcels were insured by Mannheim or by one of its subsidiaries. Throughout this case all three parcels have been treated as having been insured by Mannheim. The assured claimed under their policies and received payment before the outbreak of war. Thereupon by English law, without the need of any document, the insurers would be subrogated to the assured's rights, and as far as English law is concerned the usual practice would be for the insurers to assert their rights in the name of the assured.

In 1914 the war broke out, and in that year a statute was passed which has considerable relevancy—namely, the Trading with the Enemy Amendment Act, 1914, s. 6, sub-s. 1, of which provides that "no person shall by virtue of any assignment of any debt or other chose in action, or delivery of any coupon or other security transferable by delivery, or transfer of any other obligation, made or to be made in his favour by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against the person liable to pay, discharge or satisfy the debt, chose in action, security or obligation, unless he proves that the assignment, delivery, or transfer was made by leave of the Board of Trade or was made before the commencement of the present war." Nothing happened which could be said to give any title to the present plaintiff until the end of

1918. During the whole of the previous period the only person who could have any claim, if at all, was Mannheim, and that company, or certain people purporting to act on its behalf, or certain assured whose names it was using, issued writs in this country. As far as I can gather, writs were issued in respect of nearly every person interested in shipments on board the *Mount Oswald*. When these claims came before the Court the complications arising out of the fact that there were shipowners, charterers and sub-charterers created considerable difficulty. In one of them which came to the Court of Appeal it was said that either the master signed the bills of lading on behalf of the owners and that the owners were therefore liable, or, if the master was not acting as agent of the owners but as agent of the charterers or sub-charterers, the owners, having been in possession of the goods on their ship and lost them, were liable. One way or the other, the Court of Appeal said that the owners were liable, as their ship was unseaworthy and they were not protected by the bills of lading. A certain sum was in consequence recovered in a test action. Then came the question, who was entitled to it? The defendant claimed it under the Treaty of Peace and Orders made thereunder; the plaintiff claimed it by virtue of United States legislation, or, alternatively, he claimed to be entitled to it because he had letters of subrogation from Mannheim. If the plaintiff puts his claim on the latter ground he is in a difficulty, because it suggests that American legislation had dealt with a matter the situs of which was in England—namely, the claim against English shipowners for damages either in tort or on contract. I think probably the best way of putting his title would be under the United States legislation, which may be quite independent of any other rights; but without extremely clear words that legislation cannot change the title to a claim in England. We then get to what Mr. Hallett has called the vital question: a claim on a chose in action, a claim for damages for breach of contract or in tort against English subjects resident in England. What is the situs of that chose in action? There is considerable authority for the view that the situs is where the chose in action can be recovered—namely, where the defendant against whom the claim is made is residing. An attempt has however been made to defeat that general rule. It is said that this claim cannot be brought without production of the bills of lading and possibly of the letter of subrogation given by Mannheim, and as those were in the United States at the material time the situs of the chose in action was there. I cannot accept that as the true view. We had a similar point in the *Russian Bank for Foreign Trade* case. (1) There the Administrator of German Property sued the Russian Bank for Foreign Trade, which carried on business in England and nowhere else. That bank had undertaken that a bill drawn on it should be accepted at a certain place in London, and it was not accepted. The person entitled to the benefit of the bill was an enemy, and the person who presented and claimed on it against the Russian Bank for Foreign Trade was the Administrator of German Property. When asked what his title was he relied on Art. 297 (*b*) of the Treaty of Peace, which says that "the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories. . . . " The Administrator of German Property said that the bill of exchange came within the class of property, rights and interests affected. To that the Russian Bank for Foreign Trade replied that the claimant obtained no title under those words, because his claim could not be put forward without production of the bill of exchange, which was not then in England and therefore not in the Administrator's territory. Upon that we said that a claim on a chose in action which is recoverable at a place within the United Kingdom against a person resident here comes within the words "property, rights and interests," and Sankey L.J. pointed out that the fact that part of the proof of the claim might not be in the United Kingdom did not prevent the chose in action coming

(1) Unreported.

within the words I have quoted. In my view that exactly covers the present case. Money has been recovered by virtue of a chose in action in proceedings brought in the United Kingdom against English citizens owning a ship for breach of contract or in respect of a tort. The situs was in the United Kingdom and that being so it is within the provisions of the Treaty. It is true that the bills of lading at one time were out of the United Kingdom, but to say that that changes the situs of the chose in action is, in the language of Sankey L.J., "to be rather confusing . . . . the right with the proof of the right." I come therefore to the conclusion that the fact that certain documents relating to the claim were in the United States does not entitle the plaintiff to say that the situs of the chose in action was in the United States. In those circumstances the claim of the United States Custodian fails.

LAWRENCE L.J. I agree. The holders of the bills of lading and other documents necessary to prove the claim of Mannheim, who had by subrogation become entitled to enforce the remedies of the assured, were at the relevant time, Hermann & Co., the New York agents of Mannheim. The fact that these documents of title happened to be in the custody of Hermann & Co. at the time they were seized by the United States Custodian does not confer any better title to the policy moneys on that Custodian than that which Mannheim itself had. When, therefore, the United States Custodian took possession of these indicia of title he was forced (as Mannheim would, but for the seizure, have been forced) to come to England to assert his rights in the name of the persons legally entitled to the policy moneys. Hermann & Co. dropped out, and the action had to be brought against the shipowners, who were British subjects resident in England, in the name of the consignees of the goods, who happened also to be alien enemies. In those circumstances it is plain that the situs of the chose in action was in the United Kingdom and not in the United States. The facts of the present case bring it directly within the decision of this Court in *Administrator of German Property* v. *Russian Bank for Foreign Trade* (1), from which it is indistinguishable in principle. In that case the Court had to consider the position of the holder of a bill of exchange drawn upon a house in London and payable in London. The bill of exchange was out of the country; it had to be enforced in the only place where it could be enforced—namely, in England. I agree with what Scrutton L.J. and Greer L.J. there said that the locality of the chose in action was to be determined by the place where it could be enforced. That is the general rule, and the exceptions to it do not in my judgment touch the present case. As Sankey L.J. said, to hold otherwise would be to confuse the question as to the locality of the chose in action and the indicia of title to it. For these reasons and for those expressed by Scrutton L.J. I agree that the appeal fails.

GREER L.J. I am of the same opinion. Counsel for the appellant in his very interesting argument admitted that the success of this appeal turned upon whether the property in question was property situated within the jurisdiction of the United States. When the Peace Treaty became operative as part of the law of this country the documents were in fact in this country. That is not decisive, because the appellant's case is that before this statute came into operation the property had passed to him as Custodian of Enemy Property in the United States. If that were the true fact the appellant would be entitled to succeed. But that contention depends upon whether at the time the plaintiff obtained such rights as he did obtain the property in question was in the United States. If it was not, it was not within the jurisdiction of the plaintiff. The question whether it was so in law must necessarily be determined by the English Court if called upon to decide between the two Administrators. I regard the question as having been decided by this Court in the *Russian Bank for Foreign Trade* case. (1) There it was held that a chose in action is situated for the purposes of the operation of the Treaty of Versailles, made operative by statute, in the country where the person who has undertaken the obligation of performing the promise contained in the contract resides. It may be a promise to pay a sum of money to another or to do something which if not done will result in an obligation to pay damages for non-performance. The situs of the chose in action cannot be different when we are dealing with the case in which the obligation is to pay damages from that which it is where the obligation is to pay a sum of money as a debt. The decision in the *Russian Bank for Foreign Trade* case (1) is decisive of the situs of the interest or property which consists of the right of a party to a contract to a remedy in law. We are not bound by the statement of facts in this case as to the effect of the transactions which took place in the United States in accordance with American law; it is not an admission that under English law the same thing would apply.

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(1) Unreported.

I do not think it necessary to refer to the authorities that have been cited. There may be an exception to the general rule in the case of stocks, shares and bonds and things like these; but if there is an exception it does not apply to a claim by an insurance company standing in the shoes of the owners of goods for their non-delivery or damage. For these reasons I think Clauson J.'s judgment was right, and the appeal fails.

*Appeal dismissed.*

Solicitors for appellant: *William A. Crump & Son.*
Solicitor for respondent: *Solicitor to the Clearing Office.*

J. S. H.

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(1) Unreported.

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# LIDDIARD *v.* WALDRON.

*Easement—Right of Way—No express grant—Adjoining houses—Common owner—Implied reservation—Vendor and Purchaser.*

A grantor cannot ordinarily reserve an easement otherwise than by express words for the benefit of land which he retains.

The common owner of two adjoining houses A and B, at the back of which ran a paved path, sold A without reserving any right to use the path except for one specific purpose, and afterwards sold B:—

*Held*, that, in the absence of any evidence of a claim of user as of right admitted or acquiesced in, the purchaser of B was not entitled to use the path at the back of A for all purposes but was limited to the use which was specifically reserved.

*Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31 applied.

*Thomas* v. *Owen* (1887) 20 Q. B. D. 225 distinguished and held to have laid down no new principle.

Decision of Divisional Court [1933] 2 K. B. 319 reversed.

Appeal from the Divisional Court.

The plaintiff and the defendant were the owners and occupiers of two adjoining houses, Nos. 22 and 21 respectively, New Road, Chisledon, in the county of Wilts, which formed part of a row of houses built about 1908, and in the same manner. Behind them, and between each house and the garden belonging to it, there ran a continuously paved path giving access to the gardens and coal-sheds and to the backs of the houses. This paved path, so far as it ran behind No. 21, belonged to the defendant as part of his premises, No. 21. Apart from this path the plaintiff had no access between his garden and the road, and no means of getting coal from the road to his coal-shed except through the house.

The plaintiff claimed a right of way over this path, alleging (inter alia) the grant of an easement over the path by implied reservation.

The houses, Nos. 21 and 22, were originally let to different tenants. The defendant purchased from Miss Alford, the owner of the two houses, No. 21 in August, 1919, and the conveyance was executed in October, 1919, no mention being made in this deed of a right in the owner or occupier of No. 22 to use the path in question. The original tenant of No. 22

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had frequently used the path without objection both before and after the defendant bought No. 21.

In March, 1920, one Fox bought No. 22 from Miss Alford, and the conveyance contained no grant of any easement. The plaintiff, who bought No. 22 in 1931, was the successor in title of Fox.

In 1921 Fox asked the defendant for leave to take coal, wood and other things over the path, and the defendant agreed. The path was used after this without objection by Fox, and by two subsequent owners before the plaintiff's purchase. In October, 1930, the defendant objected to the use by the plaintiff of the path, claiming that so far as it ran behind his house it was his absolute property and that the occupier of No. 22 had no right to use it. The plaintiff thereupon brought this action claiming the right to use the way.

The county court judge gave judgment in favour of the defendant, and the plaintiff appealed.

The Divisional Court allowed the appeal, holding, following *Thomas* v. *Owen* (1), that if, when a common owner first lets or sells one of two houses or building plots, the land includes a strip, the situation and nature of which show an intention that it should be available as a way for the convenience of the other house or plot, no subsequent owner or occupier, so long as the circumstances are substantially the same, can claim to hold his land free from the right of the occupier of the other house to use the way, and so to frustrate the intention with which the original owner laid out the land. The plaintiff was therefore entitled to the right of way claimed and to an injunction against any interference with this right.

The defendant appealed.

*E. H. Wethered* for the appellant. The decision of the Divisional Court was contrary to *Wheeldon* v. *Burrows* (2), where it was clearly laid down that, generally speaking, no easement or right in the nature of an easement can be reserved by the grantor of land for the benefit of other land retained by

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(1) 20 Q. B. D. 225.

(2) 12 Ch. D. 31.

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him, unless by express words. Though there can be an implied grant of an easement, there cannot be an implied reservation of an easement (except in the case of a way of necessity) in favour of a grantor or of a person claiming through him. *Thomas* v. *Owen* (1), upon which the judgment in favour of the respondent was based by the Divisional Court, turned on its own peculiar facts, and in no way affects the principles laid down in *Wheeldon* v. *Burrows*. (2)

*Edward Terrell* for the respondent. The material facts in *Thomas* v. *Owen* (1) were similar to those in the present case, and the Divisional Court was right in regarding it as correctly stating the rule applicable to the facts of this case.

[SCRUTTON L.J. I can see no evidence of a right to use the path by the plaintiff admitted or acquiesced in. There were requests for permission to use it and those were acceded to in some cases; these requests appear to negative any user as of right.]

The path appears to have been used by the owner of No. 22 as of right since 1908, and it must be taken that when selling No. 21 the common owner could not do so without impliedly reserving the right of way in favour of No. 22.

[*Gordon* v. *Ogilvie* (3); *Hansford* v. *Jago* (4); and *Aldridge* v. *Wright* (5) were also referred to.]

SCRUTTON L.J. In the village of Chisledon in Wiltshire there is a terrace of five houses, the value of each being about 250*l*. At the back of two of these houses, Nos. 21 and 22, there is a paved path over which the plaintiff claimed an unlimited right of way from the back of his house, No. 22, past the back of No. 21 into a road. He took proceedings in the county court. The judge decided against him; he appealed to the Divisional Court, which decided in his favour; the defendant, the owner of No. 21, has now appealed to this Court.

In my view the plaintiff has not proved a right of way as against the defendant. The plaintiff's predecessor in title

(1) 20 Q. B. D. 225.
(2) 12 Ch. D. 31.
(3) (1899) 15 Times L. R. 239.
(4) [1921] 1 Ch. 322.
(5) [1929] 2 K. B. 117.

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conveyed No. 21 to the defendant in these terms: "all that messuage or tenement with the outbuildings and garden thereto situate and being in Chisledon aforesaid and known as No. 21 New Road and now in the occupation of Mrs. Wirdman together with the user of the well on property belonging to one James Howard as theretofore enjoyed and also together with the right to go pass and repass over and along the path or way to the said well and also together with the right of drainage into and user of the cesspit with the house and premises adjoining belonging to Nelson James Chun Fox to hold all the said hereditaments and premises unto and to the use of the purchaser in fee simple subject nevertheless to the payment of a proportionate part of the expense in maintaining and keeping the said well and the path thereto in repair and also to the right of the owners and occupiers of the adjoining houses entitled thereto to go pass and repass over and along the said path or way to and from the said well." No general right was reserved to pass along the path for the purpose of getting into the high road. Mr. Terrell has argued, however, despite the absence of such an express reservation, that on the facts there was an implied reservation of a right to pass, apparently for all purposes, over the path at the back of No. 21. I come to the conclusion that the plaintiff has not proved his case and I should be content to leave it there but for the fact that Talbot J. has come to a different conclusion, and as there is no judge from whom I differ on a point of law with more reluctance and anxiety than Talbot J., I say a word or two to explain the conclusion at which I have arrived.

My difference with Talbot J. turns, I think, upon my taking a different view of the facts from that which he has taken. In *Aldridge* v. *Wright* (1) I had the advantage of considering the law on this subject and I came to the same conclusion on the facts in that case as I have come to in this, namely, that the evidence shows no grant of a right to the premises in question—No. 22 in this case.

The facts, as I understand them, are these: in 1908 two friends, not jointly, erected a terrace of five houses. Miss

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(1) [1929] 2 K. B. 117.

Alford was going to erect two on her land and another lady was to erect the other three. For convenience they employed one architect and one builder.

There was a formed way along the back of all five houses, and if one looked at nothing else it might be thought that the builder intended that the occupier of each of the five houses should be able to walk behind the others' houses. That, however, is not what Miss Alford intended, for she set up a barrier between her house, No. 22, and the next house, No. 23. After that, I decline to consider the relations of Nos. 22, 23, 24 and 25, as it seems to me to be quite irrelevant. What is the position with regard to the owners of Nos. 21 and 22? They were to have the right to go along that path to get to a well. Each house was then let to a weekly tenant, and I confess that the idea of a weekly tenant wandering about with a series of easements when he can be got rid of by a week's notice is a thing of which the law will not take much notice. But in No. 21 and No. 22 there were two weekly tenants, Mr. Newman in No. 22 and Mrs. Wirdman in No. 21, and they lived in amity from 1908 to 1918. Being sensible people they did not quarrel, and so no objection was raised to Mr. Newman taking coal and dust over the path at the back of No. 21; but there is no evidence as to the terms of the weekly tenancy, none as to which weekly tenant came in first, and none whether the user was the usual friendly user between people living in adjoining houses on good terms, or whether it was a user claimed as of right and acquiesced in as being a right claimed. In 1919 the present defendant bought from Miss Alford No. 21 under a conveyance in the terms I have read, which reserves to No. 22 two named rights but makes no mention of the right now claimed, that is, of a right of way for all purposes over the path at the back of No. 21 to the high road. The later history is striking. The then owner of No. 22 went to the purchaser of No. 21 and asked permission to use the path at the back of No. 21, stating that he wanted this so that he could bring in his coals, take out his dust, take out his bicycle, and the climax came in a claim to take out his goat—a claim for permission which is quite contrary to a claim as of

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right. That owner of No. 22 left, and being succeeded by a relation of the owner of No. 21, the same user continued, and it was not till the present plaintiff came in to No. 22 that a claim to a right of way for all purposes over the path at the back of No. 21 was put forward. The owner of No. 21 objected to that user, hence this action.

Before the decision of Lord Westbury in *Suffield* v. *Brown* (1) there were conflicting decisions as to the circumstances in which an easement, continuous and apparent, or a continuous and apparent use of land belonging to the same owner would continue on a severance taking place. In *Suffield* v. *Brown* (1) the facts were these: a dock and an adjoining coal wharf belonged to the same person. The dock was used by comparatively large ships which at that time had projecting bowsprits, and whenever the dock was used it was obvious to anybody coming there that the ship's bowsprit would project over the coal wharf. Subsequently the owner of the whole of the land sold the coal wharf and granted the freehold to the purchaser without any reference to the fact that the bowsprits of the ships when in the dock—this of course was not continuous—projected over the coal wharf. The question then arose: had the owner of the dock any easement to allow the ships' bowsprits to project over the coal wharf? Lord Westbury, after reviewing the previous cases, came to the conclusion that in the absence of an express reservation of the right to have a bowsprit projecting over the coal wharf the vendor had lost that right. The question as to the correctness of that decision came before the Court of Appeal in *Wheeldon* v. *Burrows*. (2) That case had reference to rights to light and the facts have no particular relevancy to the present case, but Thesiger L.J., in delivering the judgment of the Court, stated two propositions which may be called the general rules governing cases of this kind. He said (3): "The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the

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(1) (1864) 4 D. J. & S. 185.

(2) 12 Ch. D. 31.

(3) Ibid. 31, 49.

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general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case." Then he went through the cases, and as to *Suffield* v. *Brown* (1) he said that it was rightly decided.

In Gale on Easements, 11th ed., p. 166, occurs this passage: "It was the opinion of Mr. Gale that, where two tenements had been connected by some apparent sign of servitude"—such, for instance, as the bowsprit—"and there was a severance by the grant, whether of the quasi-dominant or of the quasi-servient tenement, an easement was by implication created in favour of the quasi-dominant property. Looking upon the quasi-easement as a quality added to the dominant close by the owner of both tenements, he held that this quality remained impressed upon it for the benefit of either grantee or grantor. And, in his view, the doctrine that both parties are equally bound to respect the disposition of the property derived additional weight from its coincidence with the analogous case of easements commonly called of necessity, which, it is quite clear, are equally implied in favour of both parties. He saw no reason why a purchaser should not exercise caution in ascertaining what easements his projected purchase is liable to in favour of his vendor as well as in favour of other adjoining owners. This opinion, which was shared by Mr. Willes" [who was the editor of the third edition of Gale] "must now be considered to be overruled, the Courts considering that the operation of the doctrine in question, on a sale of the quasi-servient tenement, is prevented by the principle that 'a man cannot derogate from his own grant'" except in very limited cases. Mr. Terrell does not object to that statement in Gale, but he says that in this case there is something which brings it within the exception which one of the judges has called the rule in *Thomas* v. *Owen*. (2) That

(1) 4 D. J. & S. 185.

(2) 20 Q. B. D. 225.

case in my view turned upon its own special facts, which do not exist in this case. In *Thomas* v. *Owen* (1) the facts were these: certain land belonged to Sir Richard Bulkeley part of which before 1873 was let to the plaintiff on a lease from year to year. From that farm through the rest of Sir Richard's land there was an old lane, with hedges and fences along its sides, which could not be used for any purpose other than for going to the farm. Sir Richard in 1873 granted to the defendant a lease of the land through which the lane passed, by acreage, including the soil of the lane. Five years later Sir Richard granted to the plaintiff a longer lease. For some reason which is not apparent the tenant who had his grant in 1873 claimed that he could stop the first tenant from using the lane because, he said, he had a lease from the landlord of all the land absolutely without mentioning any right or reservation to the tenant of the farm, who had the lane, to go over the land. The Court of Appeal decided that there must be a right of the original farmer to use the lane leading to his land, because otherwise Sir Richard Bulkeley in granting the lease in 1873 to the servient tenant would be derogating from his own grant. The judgment of the Court, given by Fry L.J., proceeds on the finding that there was a legal right in the first farmer, the tenant who had originally a lease from year to year, to use the lane, and that Sir Richard having granted the farm with that right attached to it, could not derogate from that by granting to another person the whole of the land through which the lane passed. That, as I understand it, is the ground upon which, on its own peculiar facts, *Thomas* v. *Owen* (1) was decided. The only way by which Mr. Terrell, accepting the two statements I have read from Gale on Easements, can bring himself within *Thomas* v. *Owen* (1), is to say that there was in this case a legal right in 1919 which prevented the owner of No. 22 from granting No. 21 free from that right. When one inquires what the right is, it turns out to be an alleged right of a weekly tenant who is supposed to have had a grant from his landlord of a right of way for all purposes behind No. 21. I see no evidence of such a right.

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(1) 20 Q. B. D. 225.

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The user from 1908 to 1919 is amply explained by permission and friendly user without any question of a claim of right. There was the right to use the path apparently for certain purposes, namely, to go to the well, but that is not the right now claimed, and the position seems to me to be exactly as it was in *Aldridge* v. *Wright* (1), and the conclusion I came to, after going fully into the facts, was that I could see no evidence of a claim of user as of right admitted or acquiesced in, and I said this stating what might be an exception to *Wheeldon* v. *Burrows* (2) : " Another is where there is at the time of the severance a formed road or formed drain or watercourse used before the severance as of right by the tenant under the grantor of the alleged dominant tenement, in which case, as I understand, it is suggested that the grantor could not grant one set of premises so as to destroy the right of the tenant of another set of premises in respect of the premises he occupies, over the premises so granted. There must be an implied reservation of an existing right." That is the position I take in this case, and in doing so I differ from Talbot J., because he thinks he can find a claim of right acquiesced in. On the facts I have stated any user is fully explained by permission being asked and by a possible use, although we have very little evidence about it, in going along the path to get to the well. In those circumstances this appeal succeeds and the judgment of the county court judge must be restored.

LAWRENCE L.J. I agree. In my opinion *Thomas* v. *Owen* (3), upon which the Divisional Court based its decision, is not the governing authority in this case. In *Thomas* v. *Owen* (3) two well established principles were considered and applied by the Court of Appeal to the very special facts of that case and no new principle was laid down. The two principles to which I refer are, first, that a grantor may not derogate from his grant, and, secondly, that if a grantor intends to reserve any right over the tenement granted, he must expressly reserve it in the grant. Therefore, the first question which the Court had to consider in *Thomas* v. *Owen* (1) was, had the grantor granted a right of way over the lane in question to his yearly tenant of the quasi-dominant tenement before he granted the lease to the tenant occupying the quasi-servient tenement. The lane in question was a made road having a turfed bank (with a hedge on the top) on each side throughout its entire length. There was no communication on either side with the defendant's land, and the lane served no use for the defendant's farm except in so far as the defendant might drive his cattle into it for the purpose of grazing upon its margins. Its only visible purpose and reason for existence was to afford access from and to the high road to and from the plaintiff's farm. Both the plaintiff and the defendant had been in occupation of their respective farms as yearly tenants for many years before they took leases of them. During the time when they were yearly tenants only the plaintiff had used the lane and had repaired it from time to time. Neither he nor his predecessors had ever asked or received permission from the defendant or his predecessors for that user. In 1873 the common owner of both farms granted a lease to the defendant of the farm then occupied by him as yearly tenant; the description of the parcels in the lease included the site of the lane without mentioning the right which the plaintiff had to use it in connection with his property and without reserving to the grantor any right to use the lane. In 1878 the common owner granted a lease to the plaintiff of his farm "with the appurtenances," which expression the Court of Appeal held was sufficient to include a right of way over the lane if such a right had been included in his yearly tenancy. The Court of Appeal came to the conclusion on these facts, paying special regard to the fact that the lane was of no use to the defendant as a road and that it had been used and repaired exclusively by the plaintiff for many years, that a grant of a right of way over the lane was included in his yearly tenancy and that a reservation of that right ought to be implied in the 1873 lease because at the date of the lease to the defendant it had already been granted to the plaintiff, the tenant of the quasi-dominant tenement. It is to be observed that the lease to the defendant in that case (unlike the grant in the present case) contained no reservation of any other right of way, a circumstance which enabled the Court more readily to draw an inference that there was an implied reservation of the right of way in question. The facts in the present case are entirely different and distinguishable from the facts of that case. Here, whatever may have been the scheme when this terrace of five houses was originally built to have a backway common to all, any such scheme was put an end to immediately by Miss Alford, the purchaser of the two houses Nos. 21 and 22, by erecting a fence across the back passage. After the erection of that fence there remained at the back of the two houses belonging to Miss Alford a passage, paved with fire bricks in the same way as the back yards of the two houses; this passage so far as it adjoined No. 21 did not serve the purposes of No. 22 exclusively; it was accessible from No. 21 both from the back door and from the garden, and was used and enjoyed by the occupier of No. 21 as part of his holding. Thus, the passage served for the use of the owner of No. 21 as much as for the use of the owner of No. 22. Miss Alford let the two houses to two different tenants on weekly tenancies, and, although she was called as a witness she was not asked whether, nor did she aver that, she had granted to her weekly tenant of No. 22 the right to go along the passage over the land of No. 21. I do not think it would have made much difference in this case if she had given such a right, because in my opinion the principle as applied in *Thomas* v. *Owen* (1) could not properly be held to govern a case where there is only a weekly tenancy of the quasi-dominant tenement. However that may be, the fact here is that no evidence, although it was available, was given, that any right was conferred upon the weekly tenant of No. 22 to go over the land of No. 21 except such as was expressly reserved in the grant of No. 21. It was proved that in fact the tenant of No. 22 was in the habit of going along the passage at the back of No. 21, but this may well have been done by arrangement with the tenant of No. 21. On the severance of the ownership of the premises in 1919 or 1920 the conveyance of No. 21 contained a reservation for the benefit of the owner of No. 22 of a right of way over No. 21 to a well, and that reservation would be amply sufficient to explain the opening which was left in the passage between No. 21 and No. 22. There is a well known rule that where there is an express reservation of one right of way the Court ought not to imply a further reservation of another right of way unless it is driven to do so by the special circumstances of the case, such as occurred in *Cory* v. *Davies*. (1) Here I find no reason whatever for inferring that Miss Alford, when she conveyed No. 21 to Mr. Waldron, intended to reserve to herself as owner of No. 22 any right of way except the right to cross the land granted for the purpose of reaching the well. It is plain that Mr. Fox, when he bought No. 22, did not understand that any such general right had been granted to him, as he asked permission from the defendant to use the passage. It is common ground that the right of way to the well has long since been extinguished by reason of the well having been closed by the local authority for sanitary reasons, and, moreover, that is not the right of way which is now claimed. Unless the present case can be brought within the decision of *Thomas* v. *Owen* (2) I do not understand it to be suggested that there is any ground for making an exception to the rule established in *Wheeldon* v. *Burrows* (3); the case is not one of interdependent easements nor of contemporary conveyances; it is a simple case of an owner of two adjoining houses selling one without reserving to herself as owner of the other any right to go over the property she has sold except for one specific purpose. For these reasons I agree that the appeal succeeds.

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(1) [1929] 2 K. B. 117.
(2) 12 Ch. D. 31.
(3) 20 Q. B. D. 225.

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(1) 20 Q. B. D. 225.

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(1) 20 Q. B. D. 225.

Greer L.J. I am of the same opinion. The sheet-anchor of Mr. Terrell's argument is *Thomas* v. *Owen*. (2) In *Aldridge* v.

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(1) [1923] 2 Ch. 95. (2) 20 Q. B. D. 225.
(3) 12 Ch. D. 31.

*Wright* (1) this Court had the opportunity of considering a large number of decisions dealing with questions similar to those involved in this case, and in that case I collected and put together the exceptions which had been established to the rule in *Wheeldon* v. *Burrows* (2) which I understand to be this: it is easy to imply where there are no words in the grant, a grant of that which has been enjoyed as an apparent and continuous easement, but it is impossible to imply reservations, even of apparent and continuous easements, by the grantor in the grantor's own favour, because that would amount to a derogation from his grant. The Courts have been faced with the question whether or not in some cases there are exceptional circumstances which justify departure from that rule. One of those exceptional cases was established in *Thomas* v. *Owen* (3), the effect of which I ventured to summarize in these words (4): "If the owner of two adjoining properties, A and B, grants to the tenant of A a tenancy from year to year with a right of way during his tenancy over B, and subsequently leases B, the lease of B is subject to a reservation of the right of way which has ex hypothesi been granted to the tenant of A if it is shown that the lessee of B was aware of a long continued exercise of the right by the tenant of A." I am still of opinion that that is a correct summary of the effect of the decision in *Thomas* v. *Owen* (3), which related to the position as between the grantees of two adjoining farms, each grantee having been for a long time the tenant from year to year of his particular farm, and the grantee who was claiming the right to exclude the grantor's subsequent lessee from the right of way had known for many years of the continuous exercise of the right which it was alleged must be treated as being reserved. *Thomas* v. *Owen* (3) is only an illustration of the proposition that a man cannot grant to A what he has already given to B, and, therefore, in order to give effect to what he has already given to B, if the grantee knows the facts, there must be an implied reservation of that which would enable him to perform his obligation to his

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(1) [1929] 2 K. B. 117.
(2) 12 Ch. D. 31.
(3) 20 Q. B. D. 225.
(4) [1929] 2 K. B. 130.

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tenant under his existing lease. I agree that the facts of that case have no application to this, especially having regard to the fact, which I understand is conceded, that if the case turns on which of the two properties was first let, then the evidence shows that No. 21 and not No. 22 was first let to a weekly tenant. For these reasons I agree that the appeal should be allowed, but I should like to express my regret that two people living in adjoining houses cannot come to a sensible agreement as to the user of this passage.

*Appeal allowed.*

Solicitors for appellant: *Pennington & Son, for Lemon & Humphreys, Swindon.*

Solicitors for respondent: *Church, Adams, Tatham & Co., for Withy & Pooley, Swindon.*

J. S. H.

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## WOLSELEY *v.* ASSOCIATED NEWSPAPERS, LIMITED.

[1933. W. 2654.]

*Defamation—Libel—Payment into Court—Acceptance by Plaintiff in satisfaction of his claim—Application by Plaintiff for leave to make statement in open Court—Costs of application and statement—R. S. C., Order* XXII., *rr.* 1, 2, *sub-rr.* 3, 4; *Order* LXV., *r.* 1.

Order XXII., r. 2, sub-r. 4, of the Rules of the Supreme Court provides that "a plaintiff in an action for libel or slander who takes money out of Court may apply for leave to make in open Court a statement approved by a Judge in Chambers":—

*Held*, that such an application must be made by summons served upon the defendant, and not ex parte; that the summons, though heard in Chambers, should be addressed to the judge in charge of the list in which the particular action appears; that such an application is a proceeding in the Supreme Court within Order LXV., r. 1, and therefore the judge who hears the application has jurisdiction to deal with the costs incident thereto.

APPEAL from an order of Avory J. in Chambers.

The defendants, who were the proprietors and publishers of the Daily Mail, published in that paper on July 20, 1933,

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a paragraph in which the plaintiff's name was mentioned. The plaintiff considered that the paragraph was defamatory of him, and on August 8 commenced an action against the defendants for libel. The statement of claim was delivered on October 11. The defendants, who took the view that there was nothing in the paragraph defamatory of the plaintiff, on October 27 paid into Court with a denial of liability a sum of money as being enough to satisfy the plaintiff's claim. The plaintiff on November 3 accepted the sum so paid into Court in satisfaction of his claim.

On November 13 the plaintiff made an ex parte application to the judge in Chambers for leave to make a statement in open Court pursuant to Order xxii., r. 2, sub-r. 4 (1), whereupon the judge directed that a summons should be taken out to come before the judge in charge of the list in which the case, if heard, would appear, and that the summons should be served upon the defendants.

A summons was thereupon taken out by the plaintiff asking for leave to make in open Court a statement in the terms annexed to the summons subject to approval thereof by the judge in Chambers pursuant to Order xxii., r. 2, sub-r. 4, and also for an order that the costs of the application and of the statement in Court be paid by the defendants.

The summons came on before Avory J. on November 21, and, after hearing counsel for both parties, he ordered that the plaintiff should be at liberty to make in open Court a statement in the terms of the annexed statement as altered and initialled by him. He also ordered the defendants to pay to the plaintiff his taxed costs of the summons and of the statement in open Court. In due course a statement was made in open Court.

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(1) R. S. C., Order xxii., r. 1, sub-r. 1: "In any action for . . . . damages . . . . the defendant may at any time upon notice to the plaintiff pay into court a sum of money in satisfaction of the claim. . . . . "

Rule 2, sub-r. 1: "Where money is paid into court under Rule 1 the plaintiff may within seven days of the receipt of the notice of payment into court, accept the whole sum . . . . in satisfaction of the claim . . . . and thereupon he shall be entitled to receive payment of the accepted sum . . . . in satisfaction as aforesaid."

Rule 2, sub-r. 3: "If the plaintiff accepts money paid into court in satisfaction of his claim . . . . he may, after four days from payment out and unless the court or a judge otherwise order, tax his costs incurred to the time of payment into court, and forty-eight hours after taxation may sign judgment for his taxed costs."

Rule 2, sub-r. 4: "A plaintiff in an action for libel or slander who takes money out of court may apply for leave to make in open court a statement in terms approved by a Judge in Chambers."

Order lxv., r. 1: "Subject to the provisions of the Act and these Rules, the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the court or judge. . . . . "

The defendants appealed against so much of the order as related to the payment of costs by the defendants.

*Valentine Holmes* for the appellants. The costs of the application by a plaintiff under Order XXII., r. 2, sub-r. 4, for leave to make a statement in open Court with regard to an action for libel or slander in which the defendant has paid money into Court and the plaintiff has accepted the money so paid into Court in satisfaction of his claim, and of the subsequent statement in open Court, must be borne by the party making the statement. Rule 2, sub-r. 3, of Order XXII. only deals with the costs incurred by the plaintiff up to the time of payment into Court, and does not deal with the costs of an application under r. 2, sub-r. 4, and of the subsequent statement in open Court. There is no provision in r. 2, sub-r. 4, itself about the costs of an application to make a statement in open Court and of the subsequent statement. Order LXV., r. 1, which makes the costs of and incident to all proceedings in the Supreme Court to be in the discretion of the Court or judge, does not apply to the costs of such an application and statement, because on such an application the judge would have no facts before him upon which he could exercise his discretion.

*W. Blake Odgers*, for the respondent, was not called upon.

SCRUTTON L.J. We need not trouble you, Mr. Odgers. We gave leave to appeal in this case because, as far as we know, it was the first case which had come before the Court as to the meaning of and the procedure necessary under Order XXII., r. 2, sub-r. 4. For reasons which appeared good at the time, the rule as originally framed did not permit the defendant in a libel action to pay money into Court and deny liability, but this year the Rules were altered and the defendant in a libel action was allowed to pay money into Court and deny liability at the same time. The procedure is not very satisfactory to the plaintiff, because money might be paid into Court as to which it was doubtful whether or not it was sufficient to satisfy the plaintiff's claim. If the plaintiff took the money out of Court he yet remained under the stigma that the defendant had made a statement apparently libellous of him, and it had not been determined whether or not that statement was true or false. The rules under Order XXII. then proceeded to deal with what was to happen. Rule 2, sub-r. 3, provides that if the plaintiff accepts money paid into Court in satisfaction of his claim he may, on certain terms, "tax his costs incurred to the time of the payment into court." That wording, in itself, is not very accurate, because if after the time of payment into Court the plaintiff incurs certain expenses in taking the money out of Court, is it to be supposed that he cannot recover those costs, because they were not incurred at the time of the payment into Court? I am told that the Taxing Masters take the view that though the taking of the money out of Court is after the payment into Court, the person taking the money out of Court should be allowed those costs as being incidental to the payment into Court.

Then comes sub-r. 4 of r. 2 of Order XXII., which is the rule in question in this case: "A plaintiff in an action for libel or slander who takes money out of court may apply for leave to make in open court a statement in terms approved by a Judge in Chambers." That rule is not so clear as it might have been, as to what is to happen. It certainly contemplates that a judge in Chambers is to approve a statement, and that a statement is not to be made in Court except in terms approved by a judge in Chambers when a plaintiff has taken out of Court the money paid into Court by the defendant with a denial of liability. It is obvious that some limitation must be introduced into that rule, because if a plaintiff applies for leave to make a statement in open Court with regard to an action for libel or slander which has been assigned to a particular judge, it is peculiar if such an application is to be decided by the judge in Chambers not in charge of the particular list and not by the judge who presides over the open Court in which the statement is to be made. Also the rule does not say whether the application should be made ex parte or whether it should be by a summons addressed to the defendant who may be affected by the terms of the statement made in open Court. I think, and I believe the Court thinks, that inasmuch as such a statement made in open Court may affect the defendant, the defendant should be present when the judge is asked to approve the statement; that is to say, the application should be made by a summons served on the defendant.

The Court is also of opinion that inasmuch as the Court's leave is asked to make a statement in open Court, the summons, though heard in Chambers, should be addressed to the judge in charge of the list in which the particular action concerned appears—the judge who has jurisdiction over the open Court in which that action would be heard.

Thirdly, it is said that the rule says nothing about the important matter of costs one way or the other, and Mr. Holmes' complaint—which he says is not a complaint in this particular case, but is a complaint of great importance to his potential clients, the newspapers in which it may be alleged that libels are published—is that the judge under this rule had no jurisdiction to award costs, because nothing is said about the important question of costs in the rule. Order LXV., r. 1, however, says this: "Subject to the provisions of the Act and these Rules, the costs of and incident to all proceedings in the Supreme Court . . . . shall be in the discretion of the court or judge." It appears to me that an application under Order XXII., r. 2, sub-r. 4, for leave to make a statement in open Court is a proceeding in the Supreme Court, and therefore the judge who deals with that proceeding has jurisdiction to deal with the costs incident to such proceedings—I am afraid there are no proceedings in the Supreme Court to which no costs are incidental—and to deal with them in his discretion. I think the learned judge in charge of the special jury list, in which this case was, had jurisdiction to deal with the costs of this application, and was right in requiring that the application should be by a summons served upon the defendant.

I hope we have covered the variety of matters which may arise, but if not there will have to be a supplemental application on a future case.

GREER L.J. Order XXII., r. 2, referring to libel or slander actions where money is paid into Court with a denial of liability, provides that the plaintiff may take it out of Court and tax his costs under the provisions of sub-r. 3 of that rule. But the matter is not necessarily over when he has taxed his costs, because he is given further rights which he may or may not exercise. It is provided by sub-r. 4 that "a plaintiff in an action for libel or slander who takes money out of court may apply for leave to make in open court a statement approved by a Judge in Chambers." The rule of law, before this new rule was passed, was that there could not be a plea of payment into Court in a libel action with a denial of liability, for the obvious reason that what a plaintiff who had been, or who said that he had been, libelled or slandered wanted, just as much as money compensation, was the opportunity of stating in open Court, and proving if necessary, that he was not the villain he was alleged to be by the defendant, and it was felt, when these new Rules were made, that it was right, if the privilege was granted to the defendant of paying money into Court with a denial of liability and the money was sufficient to satisfy the plaintiff's claim, so that the plaintiff went on at his peril, that the plaintiff should have that which he would have had before—namely, an opportunity to make a statement in open Court with the approval of the judge in Chambers, so as to clear his character from the alleged slander, and that was the reason for the provision in sub-r. 4. If one had regard only to that sub-rule, one would think that an application under it might be made ex parte, but when one considers the two parties to an action, vis-à-vis one another, one of them alleging that he has not libelled the plaintiff and the other alleging that he has been libelled, it is impossible to suppose that the framers of the rule intended that an application for leave to make a statement in open Court with reference to the alleged libel might be made without the defendant being present, in order to prevent a statement being made which would be derogatory to him as well as having the effect of clearing the plaintiff of the alleged innuendo which possibly might not be justified by the words used. I agree with my Lord that we ought to come to the conclusion that it was implied by sub-r. 4 that the application for leave to make a statement in open Court should be made in the presence of the defendant, who would be interested in the form in which it was made.

I think that the learned judge, who dealt with the ex parte application which was made in the first place, had under Order LIV., r. 2, the right to say that it was not a case which ought to be dealt with ex parte, and that there ought to be a summons.

I regard these proceedings, which commenced with the application for the approval of the learned judge, as proceedings in the Supreme Court, the costs of which are to be within the discretion of the judge by Order LXV., r. 1. The argument put forward is that the absence of any provision for costs in sub-r. 4 of r. 2 of Order XXII. prevents the application of Order LXV., r. 1. I think it does nothing of the kind; it leaves it open to be determined otherwise than by the provision of Order XXII., r. 2, sub-r. 4, and it is so provided by Order LXV., r. 1.

SLESSER L.J. In my view the question whether the judge has a discretion which he can exercise under Order LXV., r. 1, in this case must depend upon whether Order XXII., r. 2, sub-r. 4, requires a plaintiff in an action for libel or slander, who takes money out of Court, on his application for leave to make in open Court a statement approved by the judge in Chambers, to proceed by way of summons or ex parte. In my view when the matter is rightly considered, and we get little or no assistance from the actual words of the rule, I think it is clear that what is there contemplated is an application in which the defendant should have the right to appear and object to the form of any particular statement which is sought to be approved, and for this reason: that such a statement may well affect the defendant as well as the plaintiff, and according to the general principles of law that where both parties are affected by what is done the defendant must be taken to have a right to be heard by the Court on the application for leave when a statement is to be made in open Court which may have the effect of prejudicing him. Whether in a particular case a judge thinks that there is an intervention which does or does not justify costs being given against the defendant is entirely a matter in the judge's discretion, but I think we must read sub-r. 4 as contemplating that the application is to be made by summons and not ex parte. As Greer L.J. has pointed out, there are cases under Order LIV., r. 2, where on an application made ex parte a judge may think it necessary to require that the application should be made by summons. This is not necessarily a case where the judge should exercise that discretion, but it is a case where the application should be by summons.

*Appeal dismissed.*

Solicitors for appellants: *Lewis & Lewis.*
Solicitors for respondents: *Sheard, Breach & Co.*

R. F. S.

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## HILLEN AND ANOTHER *v.* I.C.I. (ALKALI), LIMITED.

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*Oct.* 25, 26;
*Nov.* 13.

[1932. H. 3035.]

*Negligence—Unloading barge—Hatch covering improperly used as cargo stage—Collapse of hatch covering—Personal injury—Breach of Docks Regulations*, 1925 (*St. R. & O.*, 1925, *No.* 231), *reg.* 34 (*b*).

The plaintiffs, who were stevedores, were employed by steamship owners to discharge cargo from the defendants' barge to be loaded on the steamship. In carrying out this operation they, in breach of reg. 34 (*b*) of the Docks Regulations, 1925, used the hatch coverings of the barge as a stage on which to place a sling in which to put the cargo preparatory to it being hoisted on to the steamship, and they were assisted in so doing by the crew of the barge. When a load of cargo was placed on the sling the hatch coverings gave way and the plaintiffs fell into the

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hold and were injured. In respect of their injuries they claimed damages from the defendants.

At the trial the plaintiffs admitted that it was "wrongfully dangerous" to load off hatch coverings. The jury found that the plaintiffs "took the risk unknowingly," whereupon Goddard J. gave judgment in their favour. The defendants appealed:—

*Held*, allowing the appeal, (1.) that the illegality of the operation of loading from the hatch coverings, known, as it was, to the plaintiffs, excluded any duty on the part of the defendants other than to abstain from doing acts to injure the plaintiffs; (2.) that there was no obligation on the defendants to make the illegal operation of loading from the hatch coverings safe for the plaintiffs; and (3.) that the act of the barge's crew in assisting the plaintiffs in the discharge from the hatch coverings was not within the scope of their employment.

Per Scrutton L.J.: It is of great importance that the Docks Regulations, which are designed to ensure protection to life and property, should be strictly enforced, and that persons knowingly breaking them should not be entitled to escape the effects of their conscious breaking of the law.

Per Lawrence L.J.: An invitee must use reasonable care for his own safety. If he makes an unreasonable use of the premises on to which he comes, and, in consequence of such unreasonable use, sustains an injury, he cannot recover damages against the invitor.

Decision of Goddard J. reversed.

APPEAL from a decision of Goddard J. in an action tried at Liverpool with a common jury.

The plaintiffs claimed damages in respect of injuries sustained by them while engaged in discharging cargo from the defendants' barge.

The facts, which are fully stated in the judgments, were shortly as follows: The plaintiffs were stevedores and were employed by the owners of the s.s. *Darro*, on to which the cargo was to be loaded from the defendants' barge. Part of the cargo was in bags, and part in kegs. The barge had one long hold, covered by hatch covers, and there were probably fore and aft beams for the support of the hatch covers, but there was no evidence whether they were in position when the barge came alongside the *Darro*; they were not in position when the accident hereinafter mentioned happened. The cargo for the *Darro* was stowed in the barge's hold, the bags at the bottom and the kegs above the bags. The foreman stevedore ordered his men, including the plaintiffs, to send up the bags first to be loaded on the *Darro*.

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For this to be done it was necessary to get the kegs out of the way, and they were hoisted on to the deck of the barge and placed on the three foot wide gangway on each side of the hatch. The bags having then been hoisted on to the *Darro*, it became necessary to deal with the kegs, and as it was seen that the gangway was too narrow to enable a sling to be spread out on which to place them, the plaintiffs, with the help of the barge's engineer, replaced the hatch covers and on them placed the sling into which they proceeded to put the kegs. Seven kegs were put on, and when the eighth was added the hatch covers gave way, and the plaintiffs, together with the engineer of the barge, fell into the hold and were injured.

The defendants pleaded (inter alia) that the plaintiffs voluntarily undertook the risk of working on the hatch cover, and that the plaintiffs were guilty of contributory negligence.

At the trial, regs. 33 (*a*) and 34 (*b*) of the Docks Regulations, 1925, made under the Factory and Workshops Act, 1901, were relied upon by the defendants. By reg. 33 (*a*), "no deck-stage or cargo-stage shall be used in the *processes* unless it is substantially and firmly constructed and adequately supported, and, where necessary, securely fastened." By reg. 34 (*b*), "*Hatch* coverings shall not be used in the construction of deck or cargo-stages, or for any other purpose which may expose them to damage." The plaintiff Hillen, with whose evidence the second plaintiff was taken as agreeing, said: "I know it is not the right thing to load off hatch covers . . . . I have seen cargoes put on the hatch covers; it is wrongfully dangerous and should not be done."

The jury, in answer to a question left to them, found that the plaintiffs "took the risk unknowingly," whereupon Goddard J. (who did not leave the question of contributary negligence to the jury) gave judgment for the plaintiffs for the damages found by the jury, the ground of his judgment being that the crew of the barge "added a risk (without a warning of it) to the stevedores' work by not replacing the fore and aft beams to support the hatch covers."

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The defendants appealed.

*Viscount Erleigh K.C.* and *Sellers* for the appellants. The judge was wrong in holding that the appellants were liable to the respondents. The latter, it is true, were invitees on to the barge, but that does not dispose of the matter. The appellants' sole duty to them was to protect them from unusual danger which they, the appellants, knew, and the respondents did not know. The accident was due to the fact that the hatch coverings were used for loading the cargo to be placed on the *Darro*; that is expressly forbidden by reg. 34 (*b*) of the Docks Regulations, 1925, and Hillen knew it.

[LAWRENCE L.J. The engineer of the barge assisted in replacing the hatch coverings in order that the loading might be done from the top.]

That was no part of the engineer's duty. To impose a duty on the appellants arising from any act of the engineer, the Court would have to hold that the engineer had been given implied authority to act in a way which was contrary to the absolute obligation imposed by reg. 34 (*b*). Such an authority cannot be implied on the facts of this case. That the appellants' only duty was to use reasonable care to prevent injury from unusual danger, which he knows, or ought to know, is clear on the authorities: *Indermaur* v. *Dames* (1); *Norman* v. *Great Western Ry. Co.* (2); *Mersey Docks and Harbour Board* v. *Procter*. (3) In the last cited case Viscount Cave L.C. used language exactly descriptive of the position in this case; he said (4): "It is important to bear in mind the exact nature of the appellants' duty to the deceased. It was not to give him absolute protection in whatever part of the appellants' premises he might be found, but only to use reasonable care for his safety while he was upon their land and acting in compliance with their invitation; and this duty must be limited, as Lord Selborne pointed out in *Walker* v. *Midland Ry. Co.* (5), to those places to which he might reasonably be expected to

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(1) (1866) L. R. 1 C. P. 274.
(2) [1915] 1 K. B. 584.
(3) [1923] A. C. 253.
(4) Ibid. 260.
(5) (1886) 55 L. T. 489, 490.

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go in the belief, reasonably entertained, that he was entitled or invited to do so. If this test is applied, it appears to me that there was no breach of duty on the part of the appellants." In view of Hillen's knowledge of the danger of using the hatch coverings as a cargo-loading place, he could have no belief that he was invited to do what he did. If an invitee goes beyond the portion of the premises to which the invitation extends, he cannot claim protection: *Short* v. *Great Western Ry. Co.* (1)

Further, the judge was wrong in not leaving the question of contributory negligence to the jury, and in any event there ought to be a new trial.

*Lynskey K.C.* and *Maxwell Fyfe* for the respondents. There was a two-fold duty on the appellants; first, not to create a new danger on their barge; and secondly, if they did create such a danger, to warn the respondents of it. In fact, they created a new danger, namely, by putting on the hatch coverings without the fore and aft beams, knowing that the hatch coverings were about to be used as a stage from which to load the kegs on to the *Darro*. In *Mourton* v. *Poulter* (2), it was held that the owner of land owed a duty, even to a trespasser, not to do any act which would alter the condition of the land and might injure him, without giving him warning. The respondents were invitees; the general invitation to them being unrestricted as to space on the barge. The barge was safe when they came on board, and there was a special invitation by the engineer to them to use the hatch coverings, and the engineer was in charge at that time.

With regard to the Docks Regulations, 1925, it is submitted that what the draftsman had in mind was the possible use of the hatch coverings by detaching them from their position for the purpose of piling cargo on them.

On the question of contributory negligence: although Hillen admitted that he was doing something that was improper, the thing he was doing was not an immediate contributory cause of the accident. That which caused the accident was the failure of the crew of the barge to replace the fore and

(1) (1869) 34 J. P. 135.

(2) [1930] 2 K. B. 183.

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aft beams and the failure of the engineer to warn the respondents of this.

*Viscount Erleigh K.C.* in reply. By using the hatch coverings in the way they did the respondents became trespassers and to them the appellants owed no duty: Salmond on Torts (7th ed.), p. 467. [He also referred to the observations of Lord Atkinson in *Moore & Co.* v. *Donnelly.* (1)]

*Cur. adv. vult.*

Nov. 13. The following judgments were read :—

Scrutton L.J. In discharging a barge, two stevedores employed by the owners of the ship into which the barge was discharging were injured by falling through the hatch covers of the barge, which broke under their weight and the weight of the cargo they were about to load into the ship. They sued the owners of the barge. Goddard J. gave judgment for them for amounts on which no question arises. The bargeowners appeal. There is not much dispute as to the facts which were proved, but considerable dispute as to the inferences to be drawn from them, and some obscurities which were not cleared up, as the defendants, the bargeowners, called no evidence.

I endeavour to state the facts proved or in common knowledge. The owners of the barge had cargo to load into three ships at Liverpool, one of which was the *Darro.* It was not proved what the contract of carriage was between cargo-owners and shipowners, but as stevedores employed and paid by the shipowners came on board the barge to load its cargo into the ship, the contract was probably "cargo to be taken from alongside at ship's risk and expense." The barge came alongside with a considerable quantity of cargo in bags, and twenty kegs of cargo, each weighing one cwt. The barge had one long hold covered by a hatch composed of twenty hatch covers each 11 ft. 5 ins. in length aft, and about 2 ft. wide. There were two transverse beams, strengthening the hatch, which was 41 ft. long. There were probably fore and aft beams, three in all, 7 ins. by 3 ins., but there was no evidence whether they were in position when the barge came to the ship's side; they were not in position when the accident happened. If they had been in position they would certainly have strengthened the hatch covers against vertical pressure downward. The barge was manned by a crew of three men, master, mate, and, as the barge had an engine, engineer. There was no evidence that the master took any part in the discharge; the mate and engineer did take off a considerable number of hatch covers over the cargo consigned to the *Darro*, and put them back again when the hold was empty of that cargo. There was no evidence whether they took down a fore and aft beam in the aft section of the hold; if they did, they did not put it back again.

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(1) [1921] 1 A. C. 329, 345.

The cargo for the *Darro* was stowed in the after section of the hold, bags at the bottom, kegs on the top of the bags. There was no evidence how high (1.) the bags, (2.) the kegs, stood in the hold, which was 15 ft. deep. There was no contention that the barge when she came alongside the *Darro* was in a dangerous or unfit condition to discharge. The crew of the barge took off the hatches, and the stevedores' men, including the two plaintiffs, came on board to load the cargo into the *Darro*; the foreman of the stevedores went on the *Darro*. If he had pursued the ordinary course of taking out the top cargo, kegs, first, and then discharging the bottom cargo, there would have been no difficulty, and the accident would not have happened. But for some reason not clearly explained, but with a suggestion that the deck of the *Darro* was crowded with gear, he ordered his men to send up the bags first. To do this they had to get the kegs on top out of the way, and they began this by putting the kegs on adjoining cargo. The mate, or engineer, in the interest of the other cargo properly objected to this, and the stevedores thereupon put the kegs, sixteen of them, in the only available place, the three foot wide gangway on each side of the hatch. They then spread out a canvas sling or bag in the hold, put the bags in it, and hoisted them on

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board by the ship's derrick. In the last sling they sent up the remaining bags and four kegs, leaving sixteen kegs on the gangway. These had to be hoisted. The gangway was too narrow to spread out a large sling. There was no evidence as to the size of these kegs. The plaintiff Hillen said: "We could not send them up true." This was not explained, but as all ship's derricks can swing out and in from the ship's side, or turn so as to plumb fore or aft, I can see no reason why the kegs could not be sent up one or two at a time in a sling. This, of course, would be slow work, but there were only sixteen to come up. Another alternative would be to put the kegs back in the hold, a drop of 15 feet, spread the sling out on the floor and then send them up, possibly in two slings, eight kegs in each sling. To avoid these two difficulties another course was adopted. The hatch covers were put on, apparently by the mate and the engineer, the sling opened out on them, seven kegs were put into the sling, and the eighth keg was being put into the sling, when two hatch covers broke and the two plaintiffs, the engineer and the eight kegs, dropped 15 feet into the hold. The three men were injured.

The foreman stevedore said: "If I had been there I would have had the kegs put back in the hold and slung them from there." But he was on the *Darro*, saw his men loading from the hatchways, and did not stop them. The first obscurity is how exactly this method of discharge came to be adopted. It was entirely the business of the stevedores how they got the kegs into the ship; so long as they did not damage the barge or the rest of its cargo, they could do what they liked so long as they did not break the Dock Regulations made under the Factory Act, 1901. It was said that the two regulations made the course they adopted illegal. One was reg. 33 (*a*): "No deck-stage or cargo-stage shall be used in the *processes* unless it is substantially and firmly constructed and adequately supported, and, where necessary, securely fastened." It was suggested that a "deck-stage" was a temporary stage erected on the deck for loading or discharging, a "cargo-stage" one so erected on the quay. The "stage" in reg. 33 (*b*) was apparently both, but I think the word "stage" is used loosely without any clear conception of its meaning, and does not apply to something which is an ordinary part of the ship or barge, but does apply to some temporary structure erected for loading or discharging. In my opinion, the ordinary deck of a ship, or the hatch of a barge in its ordinary closed condition, is not a deck-stage or cargo-stage within the regulation.

The other regulation relied on is 34 (*b*): "*Hatch* coverings shall not be used in the construction of deck or cargo stages, or for any other purpose which may expose them to damage." In my opinion when heavy cargo is placed on hatches for the purpose of loading from them it is "used for a purpose which may expose them," the hatch covers, "to damage." Such use did damage them in the present case, and I think this regulation was meant to prohibit loading from the top of hatches. So did the stevedores. Hillen, one plaintiff, said: "I know it is not the right thing to load off hatch covers. . . . I have seen cargoes put on the hatch covers; it is wrongfully dangerous and should not be done." The other plaintiff, who was too ill to be examined, was taken as saying the same thing. Jones, another stevedore, assisted holding the kegs on the hatches, knowing the fore and aft was not put in position. Neither side had the courage to ask Hillen what he knew, but he could have seen what Jones saw. Jones said: "It is often done to sling cargo from the hatch covers. I have slung cargo from a narrow space like 3 feet." Larkin, another stevedore, said: "I know it"—loading on and from hatches—"is dangerous. I knew it was prohibited. I knew there was no fore and aft beam on." I think it is clear that the plaintiffs knew what they were doing was dangerous, and thought it was against the regulations, and could have seen, if they had looked, what their two colleagues saw, that there was no fore and aft beam in place. The foreman said: "If I had been there"—on the barge—"I would have had the kegs put back in the hold and slung them from there. I know it is improper"—i.e., to load from

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hatchways—" but it is done." He did see these men loading from hatchways and did not stop them.

The next question is, how this prohibited and dangerous method came to be adopted. Hillen says, when the bags were out " the crew then told us to get out of the hold and they put the hatches on. The engineer said that would be all right, which we took meant to put the cargo on the hatches. The engineer pulled the sling to the centre of the hatch." . . . . " The engineer said 'That will be all right,' before I put the slings on the covers." Jones says: " The two plaintiffs were busy unravelling the sling when the crew began to put the hatches on. When they put the hatches on Hillen threw the slings on the hatches and with the assistance of the engineer laid it in the centre of the hatch." Larkin said: " The engineer said 'we will sling no more casks from the hold, put the hatches on.' " . . . . " Hillen and Pettigrew " —the two plaintiffs—" unravelled the sling. The engineer placed it on the hatches."

The course of the trial was somewhat curious. The learned judge says: " Counsel agreed that I should leave to the jury only the question arising on the plea of volenti non fit injuria . . . . and the amount of damages, and it was left for me to decide on that answer and on the undisputed facts, whether the plaintiffs were entitled to judgment." Mr. Sellers, for the defendants, says, and I think plaintiffs' counsel agree, that he asked the judge to leave to the jury the question of contributory negligence, meaning, I suppose, that the plaintiffs contributed to the accident by doing what they thought to be dangerous and a breach of regulations. The learned judge, Mr. Sellers says, " waved it aside," that he, Mr. Sellers, took this as a ruling against him, and did not argue it further. I think he is entitled to say that he did not agree that the judge should decide it. I do not think the judge expressly decides anything about contributory negligence or illegality of the plaintiffs' action, but rests his decision on " a duty of the crew to warn the plaintiffs of the added risk," i.e., I suppose, that the fore and aft was not in position. There seems to be no evidence that the fore and aft was in position when the barge arrived, so it is not obvious that there was any change in or addition to the condition of the barge. The jury found that the plaintiffs "took the risk unknowingly," i.e., not knowing of any risk caused by the absence of the fore and aft. This seems to dispose of the plea of volenti.

The ground of the judgment of the learned judge appears to be that the crew of the barge "added a risk" to the stevedores' work by not replacing the fore and aft; that the plaintiffs did not know that the fore and aft was not there, and that the crew should have warned them of the risk added thereby. I would remark on this (1.) that there was no evidence whether the fore and aft was in position when the barge arrived. If it was not, the "added risk" would seem to be the stevedores doing their work, which was not crew's work, from the hatch covers. Their doing it in this way was the result of the unskilful order of the foreman stevedore to send up the bags first, which created a difficulty in afterwards sending up the kegs, which was stevedores' work, not barge's work. (2.) That though the judge refers to the fact that the plaintiffs knew that what they were doing was "contrary to regulations" and "improper," he does not consider the effect of that fact on their relations to the bargeowners.

Counsel for the bargeowners took three objections to the judgment: (1.) That the bargeowners owed no duty to the plaintiffs in respect of the operation of loading from the hatchways; (2.) that the term "contributory negligence" was wrongly used to cover the plaintiffs knowingly doing an illegal act; (3.) that there was no evidence to support the finding of the jury on the plea of volenti non fit injuria.

As to the duty owed by the bargeowners to the plaintiffs, the bargeowners and the stevedores clearly had a common interest in the stevedores coming on the barge to discharge, a situation similar to the owner of goods bringing them to or taking them from a railway station. It is unnecessary in this case to discuss whether that obligation is to use reasonable care to see that the premises are reasonably safe, as

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was held by the Court of Appeal in *Norman* v. *Great Western Ry. Co.* (1), or merely to give warning of a trap, the generally accepted view of Willes J.'s judgment in *Indermaur* v. *Dames* (2), as stated by Lord Atkinson in *Cavalier* v. *Pope* (3), and held by the Court of Appeal in *Brackley* v. *Midland Ry. Co.* (4) On this point see Salmond on Torts (7th ed.), pp. 462–464, and Pollock on Torts (13th ed.), p. 533, note (f). This is unnecessary, because there is no suggestion that when the barge came alongside and until the loading from the hatchway started there was any breach by the bargeowners of either duty. And there is no suggestion that the barge crew did any act which increased the danger. They did not put up the fore and aft, but there is no evidence that it was up when they came alongside. It would only be in the way during normal discharging from the hold, and discharging in the normal way would not require it to be replaced. The evidence is all one way that the plaintiffs knew that they were not discharging in the normal way. Hillen says: "I know it is not the right thing to do to load off hatch covers . . . . it is wrongfully dangerous and should not be done." The position is either (1.) that if the barge's crew took part in the loading from the hatchway, they were engaged jointly with the stevedores in an act contrary to regulations and therefore illegal and also dangerous; or, if the engineer was only a volunteer in work which was not his work but the stevedores', which I think is the better view, the plaintiffs doing a wrongful act to perform their work cannot claim any indemnity from the bargeowners. There is no contribution between joint tortfeasors; but there is an exception to this, as stated in *Adamson* v. *Jarvis* (5), when an illegal act is authorized by the principal, but is not to the knowledge of the agent illegal. In that case the principal told the auctioneer to sell goods, which were the goods of another, though the auctioneer did not know it. Both principal and agent were liable for conversion, but the auctioneer could

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(1) [1915] 1 K. B. 584.

(2) L. R. 1 C. P. 274.

(3) [1906] A. C. 428.

(4) (1916) 85 L. J. (K. B.) 1596.

(5) (1827) 4 Bing. 66.

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recover indemnity from the principal: otherwise if he had known of the illegality. Here the plaintiffs knew their act was "wrongfully dangerous and should not be done." It is not like the case of a person doing an act which he ought to know might injure a trespasser whom he knew to be so near that the act might injure him, as in the case of felling the tree without warning trespassing children looking on, or blasting in a quarry under similar circumstances. The engineer here did no act which added to the risk, and evidently did not think there was any danger, for he stood on the hatch and fell through. An analogous case appears to be a joint adventure of smuggling. A. owns a house to which his confederates, B. and C., bring smuggled kegs of brandy, to be lowered into A.'s cellar by a rope which A. knows to be defective. It breaks and injures B. waiting in the cellar for the keg. It seems to me clear that B. could not sue A. for not warning him of the trap in the rope, under the authority of *Indermaur* v. *Dames* (1), because the whole transaction is known by each party to be illegal and there is no contribution or indemnity between joint wrongdoers. Though it would also be true, as suggested, that a burglar could not sue the houseowner for a defect in the staircase known to the householder but not to the burglar, and a cat burglar could not sue the houseowner for non-disclosure of the added risk of a defect in the waterpipe up which he was climbing, but which he did not know of, these analogies, though amusing, do not help, as there was no invitation bringing the burglar on the premises or common interest between houseowner and burglar raising reciprocal duties.

I have come to the conclusion that the illegality of the operation of loading from the hatchways, known, as it was, to the plaintiffs, prevents any duty on the bargeowners other than that to abstain from doing acts to injure the stevedores in doing their work. There is, in my opinion, no obligation to make their illegal operation safe for them. It follows, in my opinion, that the bargeowners did not incur any obligation to the stevedores when the crew did not put up the fore

(1) L. R. 1 C. P. 274.

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and aft, even if the crew took part in the illegal operation of loading from the hatchways. I think it is of great importance that the Dock Regulations, which are designed to ensure protection to life and property, should be strictly enforced, and that persons knowingly breaking them should not be entitled to escape the effects of their conscious breaking of the law.

In my opinion the same result follows from a consideration of the contention that the act of the engineer in assisting in the discharge from the hatch was not within the scope of his employment. The barge's crew were not employed to discharge the barge; that was stevedores' work. If they do so it would be as volunteers, and it certainly was not within the scope of their employment to assist in an illegal method of discharge, or to represent it as safe.

For these reasons, I am of opinion that the judgment below cannot stand; it must be set aside and judgment entered for the defendants with costs here and below.

LAWRENCE L.J. In view of the evidence given at the trial and of the finding of Goddard J. that the plaintiffs knew that loading from the hatch covers was both dangerous and also contrary to the Dock Regulations the verdict of the jury that the plaintiffs "took the risk unknowingly" can I think mean no more than that the plaintiffs, when they determined to use the hatch covers as a loading stage, did not know whether the fore and aft beam had been placed in position or not. The learned judge held that the absence of the fore and aft beam constituted an added and unusual risk of which it was the duty of the defendants to warn the plaintiffs, and that, as no such warning was given, the plaintiffs were entitled to recover damages for the injuries which they sustained. Although contributory negligence was pleaded and relied upon at the trial by the defendants, the learned judge did not leave the question whether the plaintiffs had been guilty of contributory negligence to the jury nor deal with that question in his judgment.

With the greatest respect for the opinion of the learned

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judge I find myself unable to agree with the conclusion which he has reached. The plaintiffs were experienced dock hands employed by stevedores whose sole duty it was to discharge the cargo from the defendants' barge. The plaintiffs, although admittedly knowing that it was dangerous and illegal to use hatch covers as a stage from which to discharge cargo, did not venture to say in the witness box that when they made such wrongful use of the defendant's hatch covers they assumed that the fore and aft beam was in position, or that they would have abstained from discharging from those hatch covers if they had known that that was not the case. I know of no obligation, statutory or otherwise, resting on a bargeowner, to have a fore and aft beam to support his hatch covers, or (if he has such a beam) to keep it in position. There was no evidence to show that the fore and aft beam was in position when the barge came alongside the steamship *Darro*, or that the plaintiffs had any right to assume that it was in position when the hatch covers were replaced after the cargo had been taken out of the hold. Nor was there any evidence to show that it is the practice of bargeowners to replace a fore and aft beam when it has been removed for discharging part of the cargo and there is other cargo remaining in the hold which has to be discharged into another ship or other ships which may be lying near by. It was clearly right to replace the hatch covers before the plaintiffs began to discharge the kegs which had been placed on the narrow deck of the barge, as it would have been unsafe for the plaintiffs to have discharged the kegs with an open hatchway in such close proximity.

It was no part of the duty of the owners of the barge to see that the hatch covers were sufficiently supported so that they could safely be used as a loading stage, a user which, as before stated, was to the knowledge of the plaintiffs contrary to the Dock Regulations and therefore wrongful. As replaced by the crew of the barge, the hatch covers were in all respects sufficient for the purpose for which they were legitimately required, namely, for protecting the cargo remaining in the hold from damage by weather and for safeguarding the plaintiffs whilst engaged in discharging the kegs. In these circumstances I find it difficult to see how it can be said that by replacing the hatch covers and thus making the barge safe for the plaintiffs to discharge the kegs in a proper manner the defendants or their employees had added an unusual risk. As it was to the interest both of the shipowner and the defendants that the cargo should be discharged from the barge the plaintiffs must, in my opinion, be treated as invitees of the defendants coming within the third class in the ascending scale described by Buckley L.J. in *Norman* v. *Great Western Ry. Co.* (1) It is unnecessary in the circumstances of the present case to consider the question whether the duty imposed upon the occupier towards an invitee is to take care to make the premises reasonably safe—as was held in *Norman's* case (2)—or merely to warn the invitee that the premises were dangerous, as was held in *Brackley* v. *Midland Ry. Co.* (3)

The defendants' barge, whether the fore and aft beam was in position or not, was in all respects in a safe and fit condition to discharge her cargo both when she first came alongside and when the plaintiffs started to discharge the kegs. Consequently the defendants had adequately performed the higher duty of taking care to make the premises reasonably safe, and there was no occasion to perform the lesser duty of warning the plaintiffs of any danger. Moreover, neither in *Norman's* case (2) nor in *Brackley's* case (3) is any doubt cast on the statement of the law by Willes J. in *Indermaur* v. *Dames* (4), that an invitee must use reasonable care on his part for his own safety. An invitee who makes an unreasonable use of the premises and in consequence of such unreasonable use sustains an injury cannot recover damages against the invitor. In the present case the use made by the plaintiffs of the hatch covers cannot properly be said to have been reasonable, as it exposed the hatch covers to damage, contrary to the provisions of clause 34 (*b*) of the Dock Regulations.

The plaintiffs, however, contended that in addition to the general invitation impliedly given to them by the defendants, to come on to the barge to discharge the cargo, the defendants' engineer expressly invited them to use the hatch covers as a stage from which to discharge the kegs after they had been placed on the deck of the barge, and consequently that the defendants are liable in damages for the injuries sustained by them owing to their having accepted that express invitation.

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(1) [1915] 1 K. B. 584, 591, 592.

(2) Ibid. 584.

(3) 85 L. J. (K. B.) 1596.

(4) L. R. 1 C. P. 274, 288.

The engineer, after the hatch covers had been replaced, said to the plaintiffs "that will be all right," and then lent a helping hand in placing the sling in position on the hatch covers. I have serious doubts whether what the engineer said and did amounted to an express invitation to use the hatch covers as a stage for discharging the kegs or to anything more than signifying to the plaintiffs that they could go ahead with the discharge of the kegs and then giving the plaintiffs his voluntary assistance in adjusting the sling. The inference I am inclined to draw from the evidence is that the stevedores' men, quite apart from any invitation, had made up their minds to use the hatch covers, as soon as they had been replaced, as a stage from which to discharge the kegs rather than send the kegs up singly from the deck, and that the engineer, when he saw what they were about to do, gave them some trifling assistance by taking a hand in spreading out the sling, which was no part of his duty as a member of the crew.

Assuming, however, the true inference to be that the engineer expressly invited the plaintiffs to discharge the kegs from the hatch covers, it cannot, in the absence of any evidence on this point, be presumed that such an invitation came within the scope of his authority, as it was an invitation to do an illegal act. Furthermore, if such an invitation can properly be said to have come within the scope of his authority, it follows that the plaintiffs and the defendants were jointly engaged in an illegal operation and were joint wrongdoers, with the result that neither can have any redress against the other.

The only other matter upon which I desire to say a few words is the contention advanced by the plaintiffs that at most they were in the position of trespassers, and that the defendants at least owed a duty not to do any act which they knew might injure the plaintiffs without giving them due warning, citing

*Mourton* v. *Poulter* (1) in support of that contention. In my opinion that case, and the cases which it followed, are clearly distinguishable from, and have no application to, the present case. The ratio decidendi of those cases is that if a man does an act on his premises which he knows will endanger the safety of people standing near, such as starting a wheel, felling a tree, or setting off a blast, he owes a duty to those people, even though they are trespassers, to give them warning. In the present case the engineer did no such act. Moreover, he was obviously unaware of any danger, as he was standing with the plaintiffs on the hatch covers when they gave way.

For the reasons stated, I agree that the appeal should be allowed.

GREER L.J. This is the defendants' appeal from the verdict and judgment in favour of the plaintiffs in an action tried at Liverpool in which the plaintiffs claimed to be entitled to damages by reason of the injuries they received while engaged in discharging goods from the defendants' barge into the steamship *Darro* at Liverpool on April 8, 1932.

The facts are fully stated in my Lord's judgment, and I need not repeat them. I agree with his view that the two plaintiffs were engaged in an operation which was a breach of reg. 34 (*b*) of the Statutory Rules and Orders No. 231 of 1925, made under the Factory Acts. I also agree with Scrutton L.J.'s view that the plaintiffs were not acting in breach of reg. 33, for the reasons he has given, but this is of no importance if we are right in thinking that they were committing a breach of reg. 34 (*b*). In my judgment, the purposes for which they were using the hatch covers were forbidden by the general words of the last mentioned regulation: "for any other purpose which may expose them to damage." If the ejusdem generis rule is to be applied to the construction of this regulation, I think the purposes for which the plaintiffs were using the hatch covers were sufficiently similar to their use in the construction of deck or cargo stages to bring their meaning within the ejusdem generis rule. It follows from this that the plaintiffs cannot rely on any invitation by the engineer of the barge to them to use the hatch covers for collecting and putting into slings the kegs which they were preparing to hoist from the barge to the steamship *Darro* at the time of the accident. There was, of course, no evidence of any express authority in the engineer to invite the plaintiffs so to use the hatch covers, and no authority can be implied which would give the engineer authority to permit an operation prohibited by regulations which have the force of a statute. The plaintiffs' claim, therefore, falls to be determined upon the basis that they were not invitees but were trespassers at the time they met with their injuries, and also that they were wrongfully acting in breach of the statutory regulation. It does not follow from this that the defendants by their servants on board owed no duty to the plaintiffs. In my judgment, if it had been established by evidence that the fore and aft beam which ought to have supported the hatch covers had been taken from under the hatch covers by the crew of the barge and not replaced, and the accident had happened in consequence of the engineer not having warned the plaintiffs that the beam had not been replaced, it would have been right to hold the defendants responsible for the plaintiffs' injuries. A trespasser is not without rights, and I think it was within the implied authority of the engineer and other members of the crew (who were left on board the barge to look after the work necessary to be done by the barge crew to enable the discharge to take place) to replace the fore and aft beam, or, if it was not replaced, to warn any of the stevedore's men who were likely to be endangered while they were, to the knowledge of the engineer, engaged in work upon the hatch covers. I think such a duty arises by reason of the considerations on which Scrutton L.J. and Lawrence L.J. decided *Mourton* v. *Poulter* (1) and the decision in the House of Lords there referred to. But, unfortunately for the plaintiffs, (1.) there was no evidence given at the trial that the fore and aft beam was in the barge when it arrived alongside the *Darro*, and (2.) there was no evidence justifying the conclusion that if a warning had been given to the two

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(1) [1930] 2 K. B. 183.

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plaintiffs, they would have refused to take part in the use of the hatch covers for the purpose of putting the kegs into the sling. As regards the first point, if the fore and aft beam was not in the barge before the discharging began, it is clear that the two plaintiffs who had taken part in the discharge of the kegs and bags from the hold before the hatch covers were replaced must have known this, and the absence of any warning by the engineer would be immaterial. With regard to the second point, it seems very odd that Hillen was not asked to say whether if he had been warned that the fore and aft beam was not in position he would have gone on to the hatch covers and taken part in the operation of putting the kegs on the covers preparatory to their being lifted by the derrick from the barge to the *Darro*. One of the men who knew that the fore and aft beam was not in position took part in the dangerous operation notwithstanding this knowledge. I cannot help suspecting that the reason why the experienced counsel who appeared for the plaintiffs did not put the relevant question to Hillen was that they thought he would be bound to say that if he had been told it would have made no difference to him, and he would still have been in the place where he was when the accident happened to him. It is to be remembered that a plaintiff's case is not completed by merely proving that there was some fault on the part of the defendants ; he must also prove that that fault was the primary and proximate cause of the damage for which he claims compensation. I think there was a gap in the evidence for the plaintiffs which makes it inevitable that we should say that their claim in the action ought to have failed, and that this appeal should be allowed, with costs here and below.

*Appeal allowed.*

Solicitor for appellants : *William Morris.*

Solicitors for respondents : *Pattinson & Brewer, for G. J. Lynskey & Sons, Liverpool.*

J. S. H.

# BUTCHER WETHERLY AND COMPANY, LIMITED *v.* NORMAN.

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*Dec.* 19, 20.

[1933. B. 4390.]

*Practice—New Procedure List—Transfer to Commercial List—Action on insurance policy—Order* 38A, *rr.* 2, 3, 16.

An action against an underwriter on a policy of insurance was marked by the plaintiffs' solicitors for the New Procedure List. On the summons for directions coming before the judge in charge of that list the defendant applied for an adjournment to enable him to make an application to the judge in charge of the Commercial List for its transfer to that list, but the judge refused an adjournment on the ground that in his opinion the plaintiffs were entitled to choose their tribunal. The defendant appealed:—

*Held,* that the judge in charge of the New Procedure List was wrong in refusing an adjournment, as the defendant was entitled in such an action to apply to have it transferred to the Commercial List.

A defendant in such an action who desires to have it transferred from the New Procedure List to the Commercial List should apply for this as soon as possible, and his application should be heard by the judge in charge of the Commercial List without waiting until the summons for directions comes before the judge in charge of the New Procedure List.

Order of Macnaghten J. reversed.

APPEAL from Macnaghten J.

The plaintiffs sued on a policy which was subscribed by, among others, the defendant, an underwriting member of Lloyd's, and which insured the plaintiffs against loss and/or damage by burglary and/or theft of a quantity of glue lying at a certain wharf. During the currency of the policy the plaintiffs alleged that they had sustained a loss covered by the policy and they claimed from the defendant his proportion. By his defence the defendant relied on a condition in the policy which provided that no claim should attach where the loss was occasioned by an inmate of the premises where the glue was lying, and he alleged that the loss was occasioned by a person in the employment of the owners of the wharf. The writ was marked "New Procedure," and on a summons for directions coming before Macnaghten J., in Chambers, an application was made on behalf of the defendant for its adjournment to enable

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an application to be made to the judge in charge of the Commercial List for the transfer of the action to that List. Macnaghten J. refused the application on the ground that the plaintiffs were entitled to choose their tribunal, and as they desired a speedy trial the case should remain in the New Procedure List.

The defendant appealed.

*Schiller K.C.* and *Vos* for the appellant. This action being a commercial cause within the class of commercial actions defined in the Resolution of the judges in 1895, would, before the New Procedure Rules came into operation, have been transferred as a matter of course to the Commercial List. In *Barry* v. *Peruvian Corporation, Ld.* (1), the argument was advanced that even if a case is a commercial cause it did not necessarily follow that it would be transferred to the Commercial List, but that contention was rejected by the Court of Appeal, Rigby L.J. saying that " the plaintiff in a commercial cause has an absolute right to go before the judge charged with commercial business, directly the writ is issued, to ask for the insertion of the cause in the Commercial list." Order 38A, which contains the rules dealing with the New Procedure, provides by r. 16 that " nothing in this Order shall affect the practice as regards the trial of causes in the Commercial List or the transfer of causes to or from the Commercial List." Till now it has been the practice for the judge in charge of the New Procedure List to adjourn a summons if he is told that an application is to be made for the transfer of the case to the Commercial List, but that practice was departed from by Macnaghten J. in this case, although he agreed that this is a commercial cause. He erroneously thought that the defendant's object was to delay the trial of the action. The defendant is entitled as a matter of right to apply for the transfer. It appears that the judge in charge of the Commercial List will not entertain an application for the transfer of a case from the New Procedure List unless and until the judge in charge of the latter list is informed that the

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(1) [1896] 1 Q. B. 208.

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application for the transfer is to be made. This is said to be founded on judicial comity, but there is no warrant for such an arrangement in view of the defendant's absolute right in such an action to make the application for its transfer.

*Harold Murphy* for the respondents. Although in a sense this may be described as a commercial cause, the real question involved is the mere construction of the exception clause in the policy—whether the loss of the glue was occasioned by an inmate of the premises where it was lying. Such cases are often tried in the Short Cause List, and there is no reason why this action cannot be tried properly and expeditiously in the New Procedure List for which it had been marked. It was a matter for the discretion of Macnaghten J., and his order should not be disturbed.

SCRUTTON L.J. In this case a much more important question is involved than that which concerns the present parties, this namely, the general rights of defendants in commercial cases who, owing to the action of the plaintiff's solicitors, find themselves in the New Procedure List. It is, of course, inaccurate to speak about a Commercial Court, for there is no separate Division of the King's Bench Division so called. What happened was this : in 1894–1895, when I was in large junior commercial practice, the judges of the Queen's Bench Division agreed amongst themselves that just as they allocated year by year all revenue cases to a particular judge, they would allocate cases coming within the definition of commercial causes to judges specially conversant with commercial matters. There was great reason for this step being then taken. One of the objects of justice is to satisfy litigants that their cases are properly and adequately heard, but certain commercial cases are so complex that judges unfamiliar with that class of business require many explanations in the course of the hearing. So it may be with any judge. If I were invited to decide a question of conveyancing turning on the Law of Property Act I might reveal a good deal of unfamiliarity with the subject simply because my practice had not lain in that direction. Owing to the fact that a number of cases had come before judges not conversant with commercial matters a good deal of dissatisfaction was felt in commercial circles. In particular, there was one case in which a general average statement involving difficult questions of principle came before a judge who probably then heard of a general average statement for the first time ; he did his best, but the lay clients got tired of hearing matters quite familiar to them explained at length to the judge, who had some difficulty in grasping exactly what they were. That led to the Resolution of the judges that such cases should be heard by judges with commercial experience, and Lord Russell of Killowen C.J., Mathew J. and Collins J. were asked to hear them, they being chosen because of their special acquaintance with commercial matters. When this arrangement was made the question at once arose whether an appeal would lie from the judge taking the Commercial List who made an order for transfer. Mathew J. made an order transferring a case to the Commercial List—*Barry* v. *Peruvian Corporation, Ld.* (1)—at the instance of the plaintiff before the defendant had appeared, and made the costs costs in the cause, but gave the defendant leave, if and when he appeared, to appeal if he so desired. The defendant objected to be transferred without having been heard and he appealed, but the Court of Appeal said that while an appeal would lie on the question whether the case was a commercial cause, if it was such a cause they would not interfere with the order transferring it. On the other hand, in two cases the Commercial judge declined to transfer them on the ground that they did not come within the category of commercial cases, and the Court of Appeal declined to interfere with his decision. In *Sea Insurance Co.* v. *Carr* (2), which turned upon the question whether the Sultan of Muscat had power to make orders for the seizure of arms found in ships within the territorial waters of Muscat if intended for Persia or India, Mathew J. made an order for its transfer to the Commercial List. There the Court of Appeal reversed his order on the ground that the case was not a commercial cause.

The Commercial Court, begun for the reason I have stated,

(1) [1896] 1 Q. B. 208.

(2) [1901] 1 Q. B. 7.

worked quite comfortably and rapidly. I have known a writ being issued on a Monday and the case being heard on the Wednesday. The New Procedure List has not yet equalled that. When the latter list was introduced with a view of quickening the administration of justice and dispensing with a number of interlocutory proceedings the question arose what was to happen to the Commercial List. Rule 1 of Order 38A says: "This Order applies to actions assigned to the King's Bench Division, except as otherwise provided in this Rule. . . . ." No mention is there made of commercial causes, but r. 16 says: "Nothing in this Order shall affect the practice as regards the trial of causes in the Commercial List or the transfer of causes to or from the Commercial List."

The appearance of an action in the New Procedure List does not depend upon the order of a judge; the plaintiff or his solicitor who thinks it suitable for that list marks it "New Procedure." If the action is in the ordinary list the defendant's solicitor, when entering appearance, may include a memorandum that he wishes it to go into the New Procedure List. The judge has nothing to do with either marking, but apparently when either the plaintiff or the defendant has put a case in the New Procedure List the rules as to that list apply. What is to be done when a defendant wants his case to be heard in the Commercial List? The judge in charge of that list tells us that, as a matter of judicial comity, if an application comes before him for a transfer to his list and he is told that the action is marked "New Procedure," he asks if the judge in charge of the New Procedure List is aware of the application, and if he is told that that judge does not know of it, the application for transfer is not acceded to till the judge taking the New Procedure List has been informed. I think that the judge of the Commercial List might well modify his procedure, and that he ought to hear an application by either party for transfer, but particularly one on the part of a defendant, without regard to the fact that procedure is going on in the New Procedure List automatically without the sanction of the judge. That would remove the objection taken by Mr. Murphy that it means delay if a party has to wait for three or four weeks before he can apply for transfer to the Commercial List. At any rate it appears to me that if there is to be judicial comity it should be on both sides, and when the statement is made to the judge taking the New Procedure List that the party desires to apply to the judge taking the Commercial List, judicial comity should lead the judge in charge of the New Procedure List to say " you have a right to do so under r. 16 and I will stay my hand until you have made your application to the judge in charge of the Commercial List."

In this case we are told that the application was not made earlier because of the practice not to hear such an application till the view of the judge in charge of the New Procedure List was taken regarding it. The application was accordingly made on the summons for directions. Macnaghten J. informs me that he took the view that the defendant had no interest in the matter, and that the plaintiff had the right to settle the tribunal in which his case should be tried. In my opinion that was a wrong view. As I have said, the Commercial List was established in order that commercial causes might be dealt with by judges specially conversant with commercial matters: see *Baerlein* v. *Chartered Mercantile Bank.* (1) The New Procedure List has not been constituted in that way. Macnaghten J. tells me that although he was satisfied that this was a commercial case, he considered that the plaintiff was the person entitled to say how it should be tried, and no sufficient reason had been given why the plaintiff should not exercise what the judge considered his outstanding right. In a letter to me the judge says : " My only reason for retaining this case was that the plaintiffs desired it to remain in the New Procedure List so that it might be tried before Christmas, and defendant's counsel's application seemed to me really for a dilatory purpose." I think the judge does not do justice to the attitude of underwriters who desire their cases to be tried in the Commercial List, not because of a desire for delay, but simply because they want insurance cases to be tried by judges specially conversant with insurance. Suppose the case is one of marine insurance. The procedure of the New Procedure List does not fit in with

(1) [1895] 2 Ch. 488.

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the law applicable to marine insurance. The underwriter is not called upon to defend himself until the plaintiff files an affidavit of ship's papers giving all the information at his command. That is not provided for in the New Procedure List nor was it the intention of the Rule Committee which framed Order 38A. Roche J., who is in charge of the Commercial List, authorizes me to say that as soon as the New Procedure List Rules were framed he had a discussion with Swift J., who was then in charge of the New Procedure List, and they both agreed that cases which previously would have been tried in the Commercial List were to continue to be so tried. No difficulty appears to have arisen till the present case owing to the unfortunate view taken by Macnaghten J. that it was for the plaintiff to say in what tribunal he desired his case to be tried, and that the defendant had no voice in the matter. As I have already said, I think Macnaghten J. was wrong in that view and therefore this appeal must be allowed.

I desire to add that in my opinion the practice of the judge in charge of the Commercial List of declining to hear an application for a transfer until the party seeking it has been to the judge in charge of the New Procedure List should be altered. A party in such a case is entitled to go at once to the judge in charge of the Commercial List without first obtaining the sanction of the judge in charge of the New Procedure List. Further, I think that an application for transfer ought to be made as soon as possible without waiting for the summons for directions before the judge in the New Procedure List.

GREER L.J. I agree. If I make some general observations about the practice as between the New Procedure List and the Commercial List I wish to make it quite plain that the only question we are now deciding is whether we ought to reverse the decision of Macnaghten J. on the ground that he gave a reason for his order which is wrong in law. I have come to the conclusion that his order was wrong, inasmuch as he acted upon a reason which is not good—namely, that the

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plaintiff is in command of the situation and is entitled if he so desires, to have the action kept in the New Procedure List. No order should have been made with regard to the trial of the action in the New Procedure List until a reasonable opportunity had been given to the defendant to apply to the judge taking the Commercial List for a transfer to that list. In common with Scrutton L.J., I have had some considerable experience of the Commercial List. In addition to the reasons for the establishment of the Commercial Court, or, to speak more strictly, the Commercial List, stated by Scrutton L.J. in his judgment, two other important advantages to commercial litigants may be stated: (1.) it is desirable that these cases should be tried by a judge who can fix the date of trial so that people engaged in commercial undertakings may know in advance the date on which they should be ready to present their cases in Court, and (2.) there had been much waste of time and money in interlocutory battles, and it was thought that this might be saved in commercial cases if all the interlocutory applications came before the trial judge, and I am quite certain from my own experience that that had a markedly beneficial result not merely because of this power but by the recognition by practitioners that it was necessary for them to act reasonably with regard to interlocutory applications. At any rate, for a considerable time the Commercial Court was a great success.

I should like it to be understood that a judge sitting to hear applications for cases to be transferred to the Commercial List is sitting only as a judge of the King's Bench Division with the powers applicable to that position and no others; only he has been accorded in practice the right of saying whether cases should be transferred to the Commercial List or not. That has been on the whole a valuable addition to the practice of the Courts. Now, the feeling that prevailed previously to the institution of the Commercial Court prevails with regard to other cases, and the New Procedure Rules were made with the object of giving litigants generally similar privileges to those incident to commercial litigation. I understand that, so far,

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the New Procedure List has been successful in reducing the time between writ and trial and in reducing the number of unnecessary interlocutory applications, and it is not because I have the slightest desire to do other than wish it every success that I think in this case the decision was wrong. I want it to be understood that so long as a case is marked as fit for the New Procedure List, the judge in charge of it is the judge to whom applications as to mode of trial must be made, and he is entitled to deal with them, and if he orders trial in the New Procedure List for an adequate reason this Court will not interfere, but inasmuch as he gave a wrong reason for the order he made in the present case, we must reverse his decision and say that he ought to have given the defendant an opportunity to apply to the judge in charge of the Commercial List for a transfer. What that judge will do, it is not for us to say. He will consider whether the suggested commercial issues which appear on the face of the pleadings are real issues which involve the necessity of special knowledge of commercial matters. If he comes to the conclusion that the only substantial question in this case is whether there was a burglary and what the value of the goods lost was, he may well say that he will not transfer it. It is, however, for him to say whether he will transfer the case or not. For the reasons I have given I agree that the appeal should be allowed.

SLESSER L.J. I agree with the reasons given by Scrutton L.J. for allowing this appeal. The framers of the New Procedure Rules were not unmindful of the difficulties that might arise if that procedure were improperly employed, and they have imposed upon the solicitor in the case of the plaintiff by Order 38A, r. 3, and in the case of the defendant by Order 12, r. 17 (A), sub-r. 2, the obligation to satisfy himself that the action is one to which the Order 38A applies: "and that it is not by reason of its complexity or other circumstances unsuitable for the procedure prescribed by that Order," and the solicitor for the plaintiff is required to indorse on the writ of summons, or in the case of the defendant to certify, that in his opinion the case is fit for the New Procedure. A

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responsibility is thus cast upon the solicitors in selecting the New Procedure List. Then there is a special rule, r. 16 of Order 38A, saying that "nothing in this Order shall affect the practice as regards the trial of causes in the Commercial List or the transfer of causes to or from the Commercial List." Consequently, in my opinion, among other matters which solicitors must consider when they seek to indorse or certify must be the question whether the action may or may not appropriately go to the Commercial List. If they consider that and take a right decision on that point, difficulties will be avoided as to conflict of tribunals. I think it is very often a matter where the solicitor at the outset of the proceedings by taking these matters into consideration may save both parties expense and delay.

*Appeal allowed.*

Solicitors for appellant: *William Charles Crocker.*
Solicitors for respondents: *H. W. & S. Patey.*

J. S. H.

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## CORPORATION OF BIRMINGHAM *v.* BARNES (H.M. INSPECTOR OF TAXES).

*Revenue—Income Tax—Corporation Tramways—Profits or gains of trade—Deduction for depreciation of machinery or plant from wear and tear—Aggregate deductions allowed—"Actual cost" to trader "of the machinery or plant"—Meaning of "actual cost"—Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D—Rules applicable to Cases I. and II., r.* 6, *sub-rr.* 1 *and* 6.

Rule 6, sub-r. 6, of the rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, provides: "No deduction for wear and tear . . . . shall be allowed for any year if the deduction, when added to the deductions allowed on that account for any previous years to the person by whom the trade is carried on, will make the aggregate amount of the deductions exceed the actual cost to that person of the machinery or plant, including in that actual cost any expenditure in the nature of capital expenditure on the machinery or plant by way of renewal, improvement, or reinstatement":—

*Held*, by the Court of Appeal (Lord Hanworth M.R. dissenting), that by "the actual cost" was meant the total sum expended by the trader on the machinery or plant, after deducting therefrom all contributions towards that expenditure received from any outside source.

Decision of Finlay J. reversed.

APPEAL from a decision of Finlay J. on a case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on December 13, 1932, the Corporation of Birmingham appealed against assessments to income tax for the years ending April 5, 1931, and April 5, 1932, respectively, made upon it in respect of the profits of its tramway undertaking by the Additional Commissioners of income tax for the Division of Hemlingford.

The sole question at issue on the appeal was the amount of the deductions to be allowed under r. 6 of the rules applicable to Cases I. and II. of Sch. D. in respect of diminished value by reason of wear and tear during the respective years of the Corporation's tramway tracks.

On April 19, 1920, the Corporation entered into an agreement with the Dunlop Rubber Company, Ld., to lay a tramway track and establish a tramway service between Salford bridge, Erdington, and the Company's works upon the terms that in view of the facilities which the tramway would give for the employees of the Company to travel to and from its works the Company would pay the Corporation the sum of 10,000*l.* if the track was laid and a regular service established by June 1, 1920, and a further sum of 50*l.* for each day the service was run prior to that date. The Corporation fulfilled these requirements, and a sum of 10,806*l.* was paid by the Company. The Corporation laid the track by direct labour at a total cost of 54,752*l.*

In the year ending March 31, 1922, the Corporation spent 271,399*l.* on renewals of its tramway tracks, and received 46,238*l.* from the Government Unemployment Grants Committee.

On December 22, 1920, the Unemployment Grants Committee had issued a circular letter to County Councils and other local authorities drawing attention to an announcement

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made in Parliament that the Government had decided to provide a grant of 3,000,000*l*. for the purpose of assisting local authorities to carry out at once works on which a substantial number of the unemployed could be engaged. This letter described the conditions imposed upon or adopted by the Committee to govern the distribution of the grant. These conditions were that works would be approved only in areas where the existence of serious unemployment which was not otherwise provided for was certified by the Ministry of Labour; that preference in employment must be given to unemployed ex-service men; that the grant must not in any case exceed 30 per cent. of the wages bill of additional men taken on for work; that the works must be such as were approved by the appropriate department of the Government as suitable works of public utility; that the unemployed workmen taken on must remain on the registers of the employment exchanges and would be required to take other work at any time if the exchanges were in a position to offer them such work; and that the actual working in the schemes and the accounts relating thereto should be open at any time to any inspection required by the Committee. Applications for a grant were invited, which were to be accompanied by a general description of the works to be undertaken; a statement of the estimated expenditure on the whole scheme, showing the cost of labour as a separate item; an estimate of the expenditure which would be incurred on labour during the next three months; an estimate of the average number of men likely to be continuously employed on the work during the next three months, or of the number of additional men who would be taken on if a grant were made; information as to the manner in which the balance of the cost of the scheme would be defrayed, and the date when the scheme could be commenced or additional men taken on.

The Corporation made applications to the Unemployment Grants Committee for assistance under the specified conditions and furnished the particulars required in regard to the works to be undertaken and the Committee assented to the grants. The schemes in respect of which applications for assistance

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were made included (inter alia) works described as the reconstruction of tramway tracks in certain named roads, and in applying for the actual payment of the grants the proper officers of the Corporation set out in the prescribed form the numbers of and payments made to workmen in respect of whose wages a claim was made, and certified that all workmen in respect of whose wages a claim was made had been taken through the agency of an employment exchange; that the accounts and vouchers of the Corporation relating to the work in question were available to be submitted to audit when required; and that the payment of wages to workmen engaged for the work through the employment exchange had been duly made and accounted for as shown on the account submitted.

As a matter of administrative convenience, the Board of Inland Revenue have from time to time agreed with representatives of local authorities and other persons working tramways schemes for the computation of the deductions to be allowed in respect of the wear and tear of the machinery and plant used for the purposes of such concerns. By para. 2 of a scheme adopted in 1922 it was provided that " From the date when the track, or any portion thereof, is or has been renewed, such renewal shall be recorded and dealt with as if it were a new track, and annual allowances shall be granted in respect thereof on the basis of the sum actually expended and of the agreed life as provided in paragraph 3, provided that such allowances shall continue until the full cost has been allowed, notwithstanding that the said track or portion thereof may be again renewed before such aggregate cost has been allowed. This proviso shall apply also to expenditure on new track since 1908." Para. 3 of the scheme dealt with the methods to be adopted in computing the life of the permanent way of a tramway undertaking. In the case of the Corporation's tramways the agreed life of the tracks has been taken as twelve years.

Between 1921 and 1926 several questions were under debate between the Board of Inland Revenue and various local authorities in regard to the manner in which grants from the

Unemployment Grants Committee ought to be dealt with for the purposes of computing the liability to income tax of the authorities which had received them, and the determination of the amount of the deductions to be allowed to the Corporation in respect of the wear and tear of its plant was left in suspense. In October, 1926, the Special Commissioners heard an appeal by another local authority in which one of the questions at issue was whether the deduction to be allowed in respect of the diminished value of the permanent way of the authority's tramways by reason of wear and tear during the year under review ought to be based on the full value of the track or on the net cost to the authority of the relaying of the track after the deduction of the amount of a grant received from the Unemployment Grants Committee towards the cost of the work. The Commissioners who heard that appeal decided that they must fix the allowance under r. 6 on the value of the plant in question, irrespective of the fact that the cost of the plant was in part defrayed by some other person than the owner. In giving this decision they observed that the question of the actual cost to the appellant authority would become material in course of time when sub-r. 6 of the rule was applied.

The principle of this decision was followed in settling the deductions allowed for wear and tear of the Corporation's tramways tracks. A deduction at the rate of 4563*l.*, or one-twelfth of the total cost of 54,752*l.*, was allowed for each of the years from 1921–22 to 1929–30 inclusive, in respect of the new track laid in 1920, and a deduction at the rate of 22,617*l.*, or one-twelfth of the total cost of 271,399*l.* for each of the years from 1922–23 to 1930–31 inclusive, in respect of the tracks renewed in 1921–22. These deductions amounted in the aggregate to 41,067*l.* up to April 5, 1930, in respect of the new track laid in 1920, and to 203,553*l.* up to April 5, 1931, in respect of the tracks renewed in 1921–22. The Corporation in making its returns for the purposes of assessment claimed that similar deductions of 4563*l.* and 22,617*l.* respectively should be allowed for each of the years 1930–31 and 1931–32. H.M. Inspector of Taxes, while admitting the claim for a deduction of 22,617*l.* for the year 1930–31 in respect of the tracks renewed in 1921–22, took the view that, in arriving at the actual cost of the tracks to the Corporation, the amounts contributed by the Dunlop Rubber Company, Ld., and the Unemployment Grants Committee respectively should be deducted from the total sums expended on the tracks; that the actual cost to the Corporation of the new track laid in 1920 was 43,946*l.* only, and the actual cost to the Corporation of the tracks renewed in 1921–22 was 225,161*l.* only, and that consequently under sub-r. 6 of r. 6 the deduction for wear and tear of the new track laid in 1920 should be restricted to the difference between 43,946*l.* and 41,067*l.*, or 2879*l.* for the year 1930–31, and no allowance for wear and tear of that track should be made for the year 1931–32, and the deduction for wear and tear of the tracks renewed in 1921–22 should be restricted, for the year 1931–32, to the difference between 225,161*l.* and 203,553*l.* or 21,608*l.* The Additional Commissioners of Income Tax, in making the assessments under appeal, restricted the deductions in accordance with the view taken by H.M. Inspector of Taxes, and disallowed the Corporation's claims to the extent of 1684*l.* for 1930–31 and 5572*l.* for the year 1931–32.

In the Corporation's accounts of its tramways department for the year ending March 31, 1921, the expenditure on permanent way during the year was entered in the capital account as 43,945*l.* 11*s.* 4*d.* and no mention was made of the sum of 10,806*l.* received from the Dunlop Rubber Company, Ld. In the accounts for the year ending March 31, 1922, the contributions from the Unemployment Grants Committee were credited to a separate renewals fund account, and the total expenditure of 271,399*l.* on renewals of tracks was included in a sum debited to this account under the head permanent way reconstruction works. The renewals fund account showed a debit balance of 211,952*l.* which was carried to the balance sheet. Copies of the Corporation's printed accounts, with manuscript notes explanatory of the relevant figures, were attached to the case.

Neither party sought to draw any distinction in principle between the payment received from the Dunlop Rubber Company, Ld., and the grants received from the Unemployment Grants Committee.

It was contended on behalf of the Corporation before the Special Commissioners :—

(*a*) That the actual cost to the Corporation of the new track laid in 1920 was the total amount of 54,752*l.* expended thereon.

(*b*) That the actual cost to the Corporation of the tracks renewed in the year 1921–22 was the total amount of 271,399*l.* expended thereon.

(*c*) That the whole of the amounts expended by the Corporation in laying and renewing the tracks were moneys belonging to the Corporation, and it was immaterial whether they were ultimately obtained by the Corporation from contributions by other bodies, from loans, from rates, or from any other source.

(*d*) That the deductions allowed for wear and tear of the tracks in question did not amount in the aggregate to the actual cost thereof to the Corporation.

(*e*) That the Corporation was entitled to a deduction of 4563*l.* for each of the years of assessment in respect of the new track laid in 1920, and to a deduction of 22,617*l.* for the year ending April 5, 1932, in respect of the tracks renewed in 1921–22 as claimed in its return.

It was contended on behalf of the Crown before the Special Commissioners :—

(*a*) That the sums received from the Dunlop Rubber Company, Ld., and the Unemployment Grants Committee, though passing through the hands of the Corporation, were not at its free disposal, but were contributions by other bodies earmarked to the construction of the tracks on which they were required to be expended.

(*b*) That for the purpose of fixing the limitation of the amount of the deduction under r. 6, sub-r. 6, regard was to be had not to the actual cost of the construction or renewal respectively of the tracks, but to the actual cost to the Corporation of such construction or renewal.

(*c*) That in arriving at the amount of the actual cost to the Corporation of such construction and/or renewal the amount contributed by the Dunlop Rubber Company, Ld., and the Unemployment Grants Committee towards the cost of such construction and/or renewal fell to be taken into account and deducted from the said sums of 54,752*l.* and 271,399*l.* respectively.

(*d*) That the deductions allowed in the assessments when added to the deductions allowed for previous years, amounted in the aggregate to the actual cost of the tracks to the Corporation.

(*e*) That the deduction had rightly been restricted to the amounts allowed in the assessments.

The Special Commissioners held that the actual cost of the track to the Corporation was the net cost after deducting from the total amount expended on the construction of the tracks that part of the expenditure which was paid by the Unemployment Grants Committee and by the Dunlop Rubber Company, Ld. They accordingly adopted the view that the deductions allowed amounted in the aggregate to the actual cost of the tracks to the Corporation and rejected the appeal.

Finlay J. said that the two questions which arose on this case arose upon r. 6 of the rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, which related to the allowance for wear and tear. Rule 6, sub-r. 1, had its origin in the Customs and Inland Revenue Act, 1878, s. 12, and in 1906 *John Hall, Junior & Co.* v. *Rickman* (1) was decided by Walton J. The actual point which was then decided by the learned judge was this: that when depreciation was claimed in respect of a ship in a particular year, and when it was shown that the ship was, in fact, in that particular year depreciated, it was no answer to the claimant to say that he had in fact received in previous years the whole cost to him of the ship back in depreciation. Rule 6, sub-r. 6 (2), which originally appeared in the Finance Act, 1907, was then passed, and he thought that the words were undoubtedly drafted by the draftsman, and adopted by the legislature, as was to be expected, with special reference to the words of Walton J., and expressed that the purchaser, whether he was the original purchaser who bought from the builder, or whether he was a much later purchaser who bought second-hand, was, so to speak, dealt with separately, and it was the actual cost to that person which was not to be exceeded. In this case the question that arose was what was the meaning of the words "actual cost to that person." It seemed to him (his lordship) that the proper view was that the Corporation bore the entire cost of the tramways. The fact that the Dunlop Rubber Company, in their anxiety to get a particular tram track laid and a service opened quickly, were prepared to pay a sum of money for, it could not affect the actual cost of the plant; and although the case of the grant in aid was not so clear he thought that in that case also the actual cost to the Corporation was not affected.

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(1) [1906] 1 K. B. 311.

(2) Rule 6 provides: "(6.) No deduction for wear and tear, or repayment on account of any such deduction, shall be allowed for any year if the deduction, when added to the deductions allowed on that account for any previous years to the person by whom the trade is carried on, will make the aggregate amount

The Crown appealed. The appeal was heard on November 27 and 28, 1933.

*Sir T. Inskip A.-G.* and *R. P. Hills* for the appellants. Under r. 6, sub-r. 6, the limit set on the deductions allowed for wear and tear is the actual cost to the person by whom a trade is carried on of the machinery or plant. It is contended that "the actual cost" to the person means the amount by which the person is out of pocket in respect of the cost of the machinery and plant. In this case that "actual cost" can only be ascertained by deducting from the sum paid to the contractors the sum received from the Dunlop Rubber Company under their agreement and sum received from the Unemployment Grants Committee by reason of the employment given to unemployed persons. Finlay J., in arriving at the conclusion

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of the deductions exceed the actual cost to that person of the machinery or plant, including in that actual cost any expenditure in the nature of capital expenditure on the machinery or plant by way of renewal, improvement, or reinstatement."

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he did, paid too much attention to the mischief that r. 6, sub-r. 6, in its original form was passed to cure and too little to the actual words of the sub-rule. There is no direct authority on the point, although *Dickson* v. *Hampstead Borough Council* (1), and *Birmingham Corporation* v. *Inland Revenue Commissioners* (2), are analogous cases under the Housing Acts. Further, in *Seaham Harbour Dock Co.* v. *Crook* (3), it was decided that a grant from the Unemployment Grants Committee was not profits or gains for income tax purposes. Really, here the question turns entirely on the construction of the words of the sub-rule, and it is contended that " actual cost to that person " must mean the cost to him after bringing into account any sum received to assist in doing the work.

*A. M. Latter K.C.* and *Blanco White* for the respondents. Neither the sum paid by the Dunlop Rubber Company nor the grant from the Unemployment Grants Committee ought to be taken into account for the purpose of determining " actual cost " to the Corporation of their tramways under r. 6, sub-r. 6, of the rules applicable to Cases I. and II. In construing r. 6, sub-r. 1, as modified by r. 6, sub-r. 6, it is material to have in mind the object of the allowance for wear and tear. It is to allow the trader " such a deduction " from the amount of profits annually realized as will fairly and reasonably represent the diminished value by wear and tear during the year of the plant used to produce these profits, so that when his plant is worn out he may be in a position to replace it by new plant or machinery of a like description : *Leith, Hull & Hamburg Steam Packet Co.* v. *Musgrave.* (4) It follows that when *John Hall, Junior & Co.* v. *Rickman* (5) was decided, the amending legislation now contained in r. 6, sub-r. 6, became necessary to prevent the trader being allowed more than the amount he had expended on the machinery and plant. To hold now that the Corporation was not to be allowed part of the costs of the machinery and plant would be to refuse an allowance contemplated by the statute, and therefore to tax part of the amount expended in procuring profits. It is for that reason that some assistance is to be obtained in this case so far as regards the grant from the Unemployment Grants Committee from *Seaham Harbour Dock Co.* v. *Crook.* (1) What is material for the purpose of r. 6, sub-r. 6, is the cost to the trader of the machinery and plant, and not how he met that cost.

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(1) (1927) 11 Tax Cas. 691.
(2) [1930] A. C. 307.
(3) (1931) 16 Tax Cas. 333.
(4) (1899) 4 Tax Cas. 80, 89.
(5) [1906] 1 K. B. 311.

[SLESSER L.J. Does not such a construction strike out the word "actual"?]

A meaning can be given to "actual cost" by treating the word "actual" as excluding from the cost a sum allowed by way of discount for cash. It means true costs after all discounts and other matters which may come into the purchase price have been deducted. What was actually paid here was not reduced by the payment by the Dunlop Rubber Company or the grant by the Unemployment Grants Committee.

[ROMER L.J. If that was the intended meaning it is difficult to see why "cost" or "value" alone was not used.]

There is nothing in the words "actual cost" to bring into account the source from which the money paid for the goods has come. What the Dunlop Rubber Company paid was not given in or towards payment of the cost at all, but was directed to obtaining expedition in construction of the particular tramway. So too in regard to the renewals, the cost of those renewals to the Corporation is not affected by the fact that the Corporation received assistance towards carrying out an approved scheme to aid unemployment. It is contended therefore that neither the payment by the Dunlop Rubber Company nor the grant in connection with unemployment can be taken into account in ascertaining the actual cost of the new construction and renewals to the Corporation.

*Sir Thomas Inskip A.-G.* replied.

LORD HANWORTH M.R. This appeal from a decision of Finlay J. raises a point which is by no means easy to decide as to the meaning and effect of sub-r. 6 of r. 6 of the rules applicable to Cases I. and II. of Sch. D of the Income

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(1) 16 Tax Cas. 333, 353.

Tax Act, 1918. The Corporation are the owners of tramways and they have expended a sum in establishing and maintaining those tramways. The Corporation in the year ending March 31, 1922, spent 271,399*l*. on renewals of its tramways tracks, and in that year they received a sum, paid to them by the Unemployment Grants Committee, of 46,238*l*. The purpose of that payment was to quicken the Corporation's zeal in laying and renewing its tramway tracks in order to supply work for the unemployed. Further, in the year 1920 the Corporation entered into an agreement with the Dunlop Rubber Company under which, in return for a sum paid by the Company, the Corporation laid a track and maintained a service for the purpose of giving facilities which were of use to the Company.

The question that has arisen in the present case is at what figure the actual cost to the Corporation of the tramways is to be estimated for the purpose of calculating the sum to be allowed in respect of this wasting asset, the tramways, in computing the profits or gains of the Corporation's tramways for income tax purposes, having regard to the limit imposed by sub-r. 6 of r. 6. Ought the figure taken as the limit to be the actual sum expended by the Corporation, or ought there to be deducted from that sum the adventitious assets which came to their hands, consisting of the sum paid by the Company for the particular advantage to be reaped by themselves in accordance with the agreement of April 19, 1920, and the sum paid to the Corporation by the Unemployment Grants Committee ?

It is claimed by the Crown that what is referred to in sub-r. 6 as the actual cost must mean the net cost after deduction of these two appropriations in aid. It is said by the Corporation that the actual cost to them is the sum which they have laid out, and that these adventitious assets ought not to be deducted in order to reach the actual cost to them.

It is a difficult case, and I doubt if any one can be quite sure of his ground, whichever view he takes; but, giving the best consideration that I can to the matter, I have come to the same conclusion as that reached by Finlay J., though

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not entirely for the same reasons. By Sch. D the annual profits or gains which arise or accrue to any person from any trade, profession, employment or vocation are to be charged to tax, and the two cases to which the rules we have to consider apply are the cases first where a tax is imposed in respect of any trade not contained in any other schedule—that exception, of course, refers to mines, canals, and the like, which are taxed under a particular schedule—and secondly, when a tax is imposed in respect of any profession, employment or vocation not contained in any other schedule. Now, in respect of those two cases certain rules are made applicable particularizing the way in which the amounts of the profits or gains are to be computed. Rule 1 tells us that the tax is to "be charged without any other deduction than is by this Act allowed." Rule 3 prohibits deductions in respect of various items, and this provision is, no doubt, due to the past efforts of certain traders to make deductions in respect of the items which are there catalogued. Rule 4 deals with Excess Profits Duty, and r. 5 provides for the computation of the tax being made exclusive of the annual value of the land. Then we come to r. 6, which sets out the collected relief which has been gradually allowed by the Crown in respect of a wasting asset.

The rule now represented by r. 6, sub-r. 1, was first introduced in 1878. Gradually there has been a limited deduction allowed in respect of the losses due to the wasting assets of a particular concern, but those deductions have been carefully circumscribed. Sub-r. 1 says this: "In charging the profits or gains of a trade under this Schedule, such deduction may be allowed as the commissioners having jurisdiction in the matter may consider just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the trade and belonging to the person by whom it is carried on." The terms of that rule make it quite plain that what are being dealt with are the profits or gains of a trade, and the plant which belongs to the person who carries on the trade, and that rule gives a power to the Commissioners to allow a deduction in any year by reason of the diminution in value owing to ordinary wear and tear. Indeed, what every prudent director would do in writing off a certain portion of the cost of wasting assets is now within limits allowed. *Alianza Co.* v. *Bell* (1), as decided in the Court of Appeal, shows the good sense of making such an allowance. I refer to the case in the Court of Appeal, because in short speeches the House of Lords (2) merely affirmed the decision of the Court of Appeal.

I wish to make it plain that sub-r. 1 is dealing with machinery and plant used in a trade which belongs to the person by whom the trade is carried on. Sub-r. 6 to my mind must be read as supplementary to sub-r. 1 and as intended to impose a limit to the benefits given by sub-r. 1 in respect of the allowance for wear and tear of plant and machinery belonging to the person by whom the trade is carried on; and it provides that the deduction is not to be such as " will make the aggregate amount of the deductions exceed the actual cost to that person of the machinery or plant, including in that actual cost any expenditure in the nature of capital expenditure on the machinery or plant by way of renewal, improvement, or reinstatement." It appears to me that there must be a correlation between the deduction allowed by sub-r. 1 and the limit to that deduction imposed by sub-r. 6.

Special attention was called to the use of the word " actual " in sub-r. 6. That word is used perhaps without great precision in some other rules, as, for instance, in r. 8, sub-rr. 1 and 2, of this same series of rules. It is suggested that if a man is carrying on a trade and owing to a gift from a relative has received a sum which has enabled him to pay for his machinery, and has thus been relieved of the necessity of depleting his own bankers' balance for the purpose of meeting the cost of the machinery, then the actual cost to him of the machinery is nil. I cannot so read the words of sub-r. 6. I cannot at all agree that this sub-rule would have one operation if the machinery had originally been a

(1) [1905] 1 K. B. 184.

(2) [1906] A. C. 18.

present to the trader and a different operation if he had paid for it himself. To my mind you must read sub-r. 6 and sub-r. 1 as correlative, and construe sub-r. 6 in the sense that the trader cannot say that the actual cost of machinery to him is its original cost when new when he has bought it second-hand. The actual cost to him is the cost at which an ordinary trader would show the machinery in his books, and he would put the same trading value of machinery in his books although the machinery was originally a gift or although a portion of its cost was paid for by some other means. Perhaps I cannot put my point more clearly than by using the language commonly used by the Treasury in these matters in preparing their own accounts. It appears to me that the sums which have been received in the present case, from the Dunlop Rubber Company and from the Unemployment Grants Committee, would be treated as appropriations in aid, and that to my mind is what these two sums are, namely, two adventitious appropriations in aid. They are entirely extrinsic to the carrying on of the business. They are what I have called adventitious assets, and to say that the actual cost can only be ascertained by going behind the ordinary book-keeping of the company or trader to see whether the original cost of the machinery bulked at large to the trader himself, or whether he received some assistance from his relatives, seems to me to misread the whole purpose of r. 6 as a whole. Sub-r. 6 is to be read in relation to sub-r. 1, and the whole r. 6 must be given its appropriate place and purpose, which was to establish a proper system of computing the profits or gains of a trader in his business in respect of the trade carried on by him with machinery which belonged to him.

Under these circumstances, although I do not accept the reasoning of Finlay J. to the full, I have come to the conclusion that, in the result, he was right, and that for the reasons I have given it is not right to deduct these adventitious sums from the actual cost which ought to be taken to be the outlay made by the Corporation. In my view, therefore, I should be in favour of dismissing the appeal.

SLESSER L.J. In this case I regret that I have come to a conclusion different from that expressed by the learned Master of the Rolls.

In my opinion, this appeal should be allowed and the decision of the Commissioners affirmed. I am not unmindful of the difficulties which arise in the construction of r. 6 of Cases I. and II. from the fact that the basis on which the deductions are to be made under sub-r. 1 appears to be different from the basis contemplated under sub-r. 6 when the maximum amount of deduction is to be ascertained. As my Lord has pointed out, sub-r. 1 of r. 6 is a counterpart of s. 12 of the older Act of 1878, which provided—as the present section, in substance, provides—that the Commissioners in assessing the profits or gains for the purposes of Schedule D may allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear of machinery. It is clear that according to sub-r. 1, what the Commissioners must have regard to is the diminished value, and that value has no necessary relation to the cost to which the acquirer of the property has been put. That particular rule came up for consideration in the year 1906 in *John Hall, Junior & Co.* v. *Rickman* (1) by Walton J., and the problem which there arose was whether under s. 12 of the Act of 1878 the Commissioners were to consider to what extent there had been a diminution of value of plant or machinery in any year at the request of the subject, irrespective of the fact that the total amount of deductions might exceed in the aggregate their entire cost. That case is referred to by Finlay J. in his judgment, and he says: "the actual point which was there decided by the learned judge was this: That where depreciation was claimed in respect of a ship in a particular year, and where it was shown that the ship was, in fact, in that particular year depreciated, it was no answer to the claimant to say that he had, in fact, received in previous years the whole cost to him of the ship back in depreciation."

Finlay J. observes, and it may well be that this judgment caused the passing of sub-r. 6 of r. 6 of Cases I. and II. which we have here to construe. It may well be, as he says, that the object of that sub-rule was to nullify the effect of that decision and to provide that in no case should such a conclusion be reached. The learned judge goes on to say: "I think that the words were undoubtedly drafted by the draftsman, and adopted by the Legislature, as one would expect they would be, with special reference to the words of Walton J., and expressed that the purchaser, whether he is the original purchaser who buys from the builder, or whether he is a much later purchaser who buys second-hand, is, so to speak, dealt with separately, and it is the actual cost to that person which is not to be exceeded." I am not very clear from the judgment of the learned judge how far he limited his interpretation of the meaning of the words "actual cost to that person" in sub-r. 6 by reason of the view which he had formed of the mischief against which the sub-rule was directed; but however that may be, I have come to the conclusion that the language of the sub-rule is compelling upon me and that there is no sufficient ambiguity to justify me in interpreting this rule by references to its history or the mischief against which it was directed.

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(1) [1906] 1 K. B. 311.

I read the passage from the rule declared by the judges in advising the House of Lords in the *Sussex Peerage* case (1) (which was accepted by the Judicial Committee of the Privy Council in *Cargo ex "Argos"* (2)) to this effect: "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver." I do not think Finlay J. should have allowed his interpretation of these words to be influenced, if, as appears from his judgment, it was so influenced, by a consideration of the purposes which brought this sub-rule into being. If we regard the sub-rule solely on its actual language, what do we find? We find that the word "value," which appears in sub-r. 1, is omitted, and in its place is substituted, "the actual cost to that person of the machinery or plant." The learned judge has taken a view which I gather did not commend itself to my Lord. He has come to the conclusion, apparently, that if the whole of the property were a gift it could not be said that there was any actual cost. That seems to me to be a conclusion which would be logical and acceptable if the same principle were applied, as I seek to apply it, when part of the property was the result of a gift as regards the actual cost to the donee of that part; but, with every respect to the learned judge, I cannot understand the principle whereby he decided, apparently, although by way of obiter dictum only, that if the whole machinery were given to the donee as a gift there would be no actual cost to the trader, although the value would be the same as if he had purchased it, while at the same time he decided that where a part is given to the donee that part is to be regarded as a part of the actual cost. In my view "actual cost" means that expense to which the person sought to be charged by tax is put in the acquisition of the property.

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(1) (1844) 11 Cl. & F. 85, 143.

(2) (1873) L. R. 5 P. C. 134, 153.

As regards the grant by the Unemployment Grants Committee, it is stated in the case that the Government, acting through the Ministry of Labour and the Unemployment Grants Committee, on receiving estimates of the expenditure, the average number of men, and so on, gave a sum of money in respect of the cost of labour, which was one of the elements in the total cost of making the tramway. It was a direct assistance solely for that purpose, and earmarked for that object. It was a direct payment of part of the labour; just as direct, it seems to me on the finding of fact in this case, as if it had been for the purchase of rails or any other material; in other words, a part of the cost of renewals was paid for by someone other than the Birmingham Corporation. Further, it is said in the case that "neither party sought to draw any distinction in principle between the payment received from the Dunlop Rubber Company, Ld., and the grants received from the Unemployment Grants Committee." It might be said otherwise, that it was by no means so clear that the money given by the Dunlop Rubber Company for facilities for a tramway service to their works was so directly

Slesser L.J.

contributed to cost as in the case of the grants from the Unemployment Grants Committee, but here we are testing a question of principle. The parties have agreed that the cases should be treated alike, and so far as the question is one of fact the Commissioners have decided that the actual cost of the tracks to the Corporation was the net cost in both cases. I am unable to distinguish the words " net cost " as found by them from the words " actual cost." I think they mean and I think the sub-rule means that it is the actual financial cost to the Birmingham Corporation, that is, the expenditure incurred in providing the tramway, less so much of that expenditure as is directly paid for by some one other than the person sought to be taxed. I agree respectfully with my Lord that the result is a difficult, and in many respects a confusing one, because, as I said at the outset of my judgment, it means that the limitation of the deduction proceeds upon a different basis from the deduction itself, but my answer is that the Legislature thought fit to use different language; it has used the word " value " in sub-r. 1; it has used the words " actual cost " in sub-r. 6; and though I read the sub-rules together in the sense that the one is a rider upon the other, yet I feel I am not justified in doing such violence to the language as would I think be necessary to support Finlay J.'s judgment. It would mean I think taking out the word " cost " from sub-r. 6 and inserting the word " value " from sub-r. 1. The two words are being used apparently in contradistinction, and for these reasons I have come to the conclusion that the net cost is the limit of the total amount to be allowed for deductions under sub-r. 6, and that therefore, as I have said, the Commissioners were right, and this appeal should be allowed.

ROMER L.J. I, too, have come to the conclusion that this appeal should be allowed, and, as my reasons for arriving at that conclusion are substantially those which Slesser L.J. has just expressed, it is not necessary for me to add more than a very few words.

When the provisions of sub-r. 1 of r. 6 were in operation free from the qualifications subsequently introduced by sub-r. 6, it cannot I think be doubted but that the deduction permitted by the sub-rule could be allowed irrespective of the question of the source from which the trader in question had obtained his plant and machinery. All that was necessary was to ascertain the value of the plant and machinery at the beginning of the year in question and then find out to what extent that value had been diminished during the year owing to wear and tear. Even if the plant and machinery had been obtained by the trader as a gift, he was still entitled to make a deduction to the extent to which the value of the plant and machinery at the beginning of the year had been diminished during the year by wear and tear. The object, of course, with which the trader himself makes the deduction is clear. It is to ensure that when the machinery and plant are worn out and no longer useful he will be in possession of a fund derived by these deductions from his profits which will be equivalent to the value of the plant and machinery at the time that he started trading with them. That rule without any qualification led, as has been pointed out by Slesser L.J., to a somewhat strange result in *John Hall, Junior & Co.* v. *Rickman.* (1) In that case, owing, no doubt, to the depreciation having been over-estimated in certain years, a time arrived when the total deductions made from the profits were in excess of the value of the plant and machinery at the time that the trader started operations with them.

Had the introduction of sub-r. 6 been intended merely to correct that anomalous state of affairs nothing could have been easier than for the Legislature to say so. On the contrary, so far from the sub-rule making any reference to the value, we find a reference to cost, and not to cost only, but to the actual cost to the trader of the plant and machinery in question.

Now, is it possible to say in view of those words that when a trader has had given to him as a present his plant and machinery, there has been any actual cost to him in respect of that plant and machinery ? The question to be put to the

(1) [1906] 1 K. B. 311.

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trader is this: What did the plant and machinery actually cost you? Supposing in this case that the Dunlop Rubber Company for their own purposes had constructed a tramway at a cost of 54,752*l.* and had then presented it to the Birmingham Corporation, is it possible that the Birmingham Corporation could say that the tramway had cost them anything? Surely not. Instead of themselves constructing the tramway and then presenting it to the Corporation, the gift might have been effected in another way. The Dunlop Company might have said to the Corporation: "You construct the tramway and then we will repay to you the cost to which you have been put." What then would be the answer of the Corporation to the question: "What did that tramway cost you in the end?" I should have thought the Corporation might conceivably have said: "Well, the tramway cost us 54,752*l.*, but having regard to the fact that this sum was repaid to us by the Dunlop Rubber Company, the actual cost to us was nil." I find, like Slesser L.J., that the words in sub-r. 6 are too strong to enable me to say that the only object and effect of the section is to correct the anomaly that was pointed out in *Rickman's* case. (1) For these reasons, I think the appeal should be allowed and the decision of the Commissioners restored.

*Appeal allowed.*

Solicitors: *Solicitor of Inland Revenue; Sharpe, Pritchard & Co., for F. H. C. Wiltshire, Town Clerk, Birmingham.*

(1) [1906] 1 K. B. 311.

H. C. G.

## MATTHEWS *v.* KING AND OTHERS.

1933
*Oct.* 24,
25, 31.

*Ecclesiastical Law—Church of England—Church Service disturbance—"Divine Service"—Ecclesiastical Courts Jurisdiction Act,* 1860 (23 *&* 24 *Vict. c.* 32), *s.* 2.

The Ecclesiastical Courts Jurisdiction Act, 1860, s. 2, provides: "Any person who shall be guilty of riotous, violent, or indecent behaviour . . . . in any cathedral church, parish or district church or chapel of the Church of England . . . . or in any chapel of any religious denomination, . . . . whether during the celebration of divine service or at any other time, . . . . or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorised to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament, or any divine service, rite, or office, in any cathedral, church, or chapel, . . . . shall, on conviction thereof before two justices of the peace, be liable to a penalty . . . ."

*Held*, that the words "divine service" in the earlier part of that section are used in their widest sense; and that the words "any divine service, rite, or office in any cathedral, church, or chapel" in the latter part of the section are used to cover all the services in the Church of England in these places, including the celebration of the sacraments, and that the special mention immediately preceding these latter words of "any sacrament" refers to the celebration of any sacrament outside a cathedral, church, or chapel.

A parish church, at the time of the service hereinafter mentioned, contained a sanctus bell, a figure of the Madonna and Child, and a blue votive lamp all of which had been directed to be removed by an order of the Consistory Court. On a certain Sunday, in the absence through illness of the incumbent of the church, a clergyman in holy orders, being a canon, ministered or celebrated a service in the church in the course of which he performed the ceremony of the Asperges with the use of lighted candles although it was not prescribed or ordered by the Book of Common Prayer; celebrated the holy communion service omitting therefrom the ten commandments and the lengthy exhortation; wore during the sermon or some parts of it an amice, an alb, a maniple, a stole, a cope, and a biretta; and elevated the elements from the altar after consecration. During the service incense was used ceremonially, the sanctus bell was rung before, during, and at the end of the consecration prayer, and during that prayer one of the church bells was rung. It did not appear that any order had been made by lawful authority for the use of the service in question in so far as it differed from the form of service prescribed by the Book of Common Prayer, or for the use of any form of service other than that there prescribed, but it was stated that the service in question had the sanction of the bishop of the diocese.

*Held*, (1.) that the service in question, assuming it to be legally valid, was not a sacrament only, but a "divine service" within the meaning of the Ecclesiastical Courts Jurisdiction Act, 1860, s. 2, and (2.) that although the above mentioned articles, acts and omissions were departures from the laws of the Church of England, yet such departures did not prevent the service from being a "divine service" within the meaning of that section; and, consequently, that persons who disturbed the clergyman while conducting the service disturbed a clergyman ministering or celebrating divine service within the meaning of the section and were liable to conviction for an offence thereunder.

*Newbery* v. *Goodwin* (1811) 1 Phillim. 282 referred to.

CASE stated by justices for the West Penwith division of the County of Cornwall.

On June 6, 1933, the justices sitting at Penzance heard concurrently informations preferred by police-superintendent W. J. Matthews (hereinafter called "the appellant") under the Ecclesiastical Courts Jurisdiction Act, 1860, against Miss Anna Maria King and eleven other persons (hereinafter called "the respondents") for that they on Sunday, December 11, 1932, in the parish church of the parish of St. Hilary did disturb a clergyman in holy orders, namely, Canon F. R. Carr, ministering or celebrating divine service in that church contrary to the statute.

At the hearing of the informations the following facts were proved or admitted: (1.) The respondents on Sunday, December 11, 1932, in the said church did disturb the said clergyman while ministering or celebrating service in the church. (2.) Canon Carr entered the church about 11 o'clock in the morning and proceeded to perform the ceremony of the Asperges with the use of lighted candles, which was not prescribed or ordered by the Book of Common Prayer. (3.) Subsequently Canon Carr proceeded to celebrate the Holy Communion service, omitting therefrom the ten commandments and the lengthy exhortation, but in other respects in the language and manner prescribed in the Book of Common Prayer. (4.) At the time of the service the church contained certain articles—namely, a sanctus bell, a figure of the Madonna and Child, and a blue votive lamp all of which had been ordered to be removed by an order of the Consistory Court. Canon Carr was not the incumbent of the church but was conducting the service in the absence through illness of the incumbent, the Rev. N. B. Walke. (5.) Throughout the ceremony or service or some parts thereof Canon Carr was wearing the following garments, the wearing of which by a clergyman of the Church of England the defendants contended was illegal —namely, an amice, an alb, a maniple, a stole, a cope, and a biretta. (6.) During the conduct of the service incense was used ceremonially and the sanctus bell was rung before, during, and at the end of the consecration prayer, and also during the consecration prayer one of the church bells was rung. (7.) During the service Canon Carr elevated the elements from the altar after consecration. He stated that there was no public adoration by him, but that as a fact he did in his private devotions privately adore. There was, however, a public adoration by some members of the congregation, but that was not observed by Canon Carr, whose back was turned to the congregation. (8.) There was no evidence of any order having been made by lawful authority for the use of any form of public prayer or administration of the sacraments other than that prescribed by the Book of Common Prayer, but it was stated by Canon Carr that the ceremony carried out by him had the sanction of the bishop. (9.) The disturbance, which consisted mainly of the organized loud singing of hymns which were not the hymns ordered for the day and which commenced immediately Canon Carr made his appearance from the vestry, lasted throughout the whole of the service so as to make the officiating clergyman's voice inaudible. Apart from singing, when Canon Carr entered the pulpit and attempted to deliver his sermon the respondent Miss King shouted: "Get out of the pulpit with those popish garments on," and all the respondents proceeded to sing so loudly that the sermon was absolutely inaudible.

On behalf of the appellant it was contended that the disturbance of Canon Carr in the aforesaid circumstances constituted an offence under s. 2 of the Act of 1860 (1), on the ground that it occurred while Canon Carr was celebrating divine service in the church within the meaning of that section, that the words "any divine service" in that section meant any service reverently directed to the worship or praise or service of God, that the object of the section was to prohibit the disturbance of a clergyman in holy orders who was ministering or celebrating any such service in a church, that it was not necessary in order to constitute the offence that the service disturbed should be a service in accordance with the Book of Common Prayer, and that the irregularities alleged did not prevent the service from being a divine service within the section.

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(1) The Ecclesiastical Courts Jurisdiction Act, 1860, s. 2, provides: "Any person who shall be guilty of riotous, violent, or indecent behaviour in England or Ireland in any cathedral church, parish or district church or chapel of the Church of England and Ireland, or in any chapel of any religious denomination, or in England in any place of religious worship duly certified under the provisions of [the Places of Religious

On the part of the respondents it was contended (*a*) that in order to establish that the ceremony or service disturbed was "divine service" within the section, it was necessary to prove that it was prescribed by and was being celebrated according to the Book of Common Prayer or otherwise as ordered by lawful authority, (*b*) that in view of the various facts, practices and alleged irregularities set out above in paragraphs (2.) to (8.) the service was not a divine service within the section, (*c*) that the sermon was not part of divine service within the section, (*d*) that Canon Carr was purporting to celebrate a sacrament, and that a sacrament was distinct from, and was not, a divine service within the section.

The justices, by a majority, being of opinion that in view of the matters above indicated in paragraphs (2.) to (8.), or of some of them, the said service was not a divine service within the section, accordingly dismissed the informations.

The question for the Court was whether, upon the above statement of facts, the justices came to a correct determination and decision in law, and if not, the Court was requested to

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Worship Act, 1855] whether during the celebration of divine service or at any other time, or in any churchyard or burial ground, or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorised to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament, or any divine service, rite, or office, in any cathedral, church, or chapel, or in any churchyard or burial ground, shall, on conviction thereof before two justices of the peace, be liable to a penalty . . . ."

reverse or amend their determination or to remit the matter to the justices with the opinion of the Court thereon.

*Vaisey K.C.* and *Harold Murphy* for the complainant, appellant. The decision of the justices was wrong. First, it is said on behalf of the respondents that in s. 2 of the Ecclesiastical Courts Jurisdiction Act, 1860, divine service and the communion service are contrasted, and that the respondents have been wrongly convicted of interrupting a service of the former description. It is submitted, however, that the intention of the section is to protect the clergyman while celebrating any religious service in a church, and that divine service may be defined as a service the object and intention of which is the adoration of God, or, as set out in the case " any service reverently directed to the worship or praise or service of God." No such distinction as that alleged is recognized in the Church of England. The rubric at the end of the communion service says: " After the divine service ended," and then gives directions as to the offertory money. There the " divine service " referred to is the communion service. The rubric at the beginning of the marriage service directs that the banns must be published in the church on three several Sundays " during the time of morning service." That service would often include the communion service, but no distinction is drawn in the rubric between the two services. The rubric in the communion service at the end of the Nicene creed states that nothing shall be proclaimed in the church during the time of divine service but by the minister, and thus shows the identity of divine service and communion service. By Canon 19 churchwardens are directed to prevent idlers abiding in the church porch " during the time of divine service," and although communion service is not there mentioned it must be implied in the direction. In s. 2 of the Act of 1862 " divine service " should be construed as referring to any service conducted in the church, including even a harvest festival, an armistice celebration, or a service for boy scouts. The object of the Act is to protect a clergyman doing

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something as part of a service which it is his duty to do: *Cope* v. *Barber*. (1)

Secondly, it is contended on behalf of the respondents that this service was not divine service because of irregularities in procedure and the presence of illegal ornaments. In answer to that contention it is submitted that it cannot be the duty of the police to satisfy themselves that all the directions in the Prayer Book have been obeyed. The fact that some objects which the chancellor of the diocese had ordered to be removed were still in the church did not justify a disturbance of this character. If the clergyman introduces any irregularity into the service, the churchwardens themselves cannot interfere, but can only report the matter to the authorities: see Halsbury's Laws of England (2nd ed.), art. 1441, vol. ii., p. 783. A congregation would not be entitled to brawl if, for example, the clergyman were to wear white flannel trousers under his gown. [*Kensit* v. *Rose* (2) and *Asher* v. *Calcraft* (3) were referred to.]

*Tucker K.C.* and *Wilfrid Lewis* for nine of the twelve defendants, respondents. The respondents are charged, under the latter part of s. 2 of the Ecclesiastical Courts Jurisdiction Act, 1860, with having on the occasion in question disturbed a clergyman while ministering or celebrating "divine service," but they were not guilty of that offence.

First, assuming that the service in question was a lawful service of some kind, it was not a divine service within the meaning of the section, but only a sacrament. The expression "divine service" as there used means the full ordinary service of the Church of England as prescribed by authority. In Canons 16, 17, 18, 19 and 56 that expression is clearly used of the ordinary service and not of a sacrament or other special service, and in the last mentioned of these canons a plain distinction is drawn between divine service and the sacraments. In Gibson's Codex Juris Ecclesiastici Anglicani, Tit. 13, cap. IV (ed. 1761, vol. i., p. 299 seq.), the several parts of divine service are set out, but the sacraments are not there included, and at p. 301 there is a note which states that the rubrics concerning the sacraments of baptism and the communion are set down elsewhere; and in that work the sacraments are thus separated from divine service. In a succession of statutes the prescribed divine service, which is there sometimes called common prayer, or morning or evening service, is distinguished from the sacraments, these statutes being the Act of Uniformity, 1548 (2 & 3 Edw. 6, c. 1), Title, Preamble, and s. 2; the Act of Uniformity, 1551 (5 & 6 Edw. 6, c. 1), Title, Preamble, and ss. 1, 2; the Act of Uniformity, 1558 (1 Eliz. c. 2), Title and s. 3; the Act of Uniformity, 1662 (14 Car. 2, c. 4), ss. 1, 2; the Offences in Church Act, 1553 (1 Mary, sess. 2, c. 3), s. 1; and the Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 35), ss. 4, 5. It is to be observed that s. 3 of the Act of 1553 is the original form of the section now in question, and the two sections ought therefore to be similarly construed. The Act of 1872 by s. 2 provides a shortened form of morning and evening prayer, that is of the ordinary divine service, by s. 4, provides an additional form of service varying from the prescribed form and expressly directs that there be not introduced into it any portion of the order for the Lord's supper, and although by ss. 4 and 5 it treats the communion as a service it does not treat it as divine service. From several of the Acts already mentioned and certain other Acts it appears that divine service means the prescribed service of the Church of England and no other devotional service, the service of Protestant Dissenters, Roman Catholics and Jews being there described as religious worship: see the Offences in Church Act, 1553, ss. 1, 3, 4; the Roman Catholic Relief Act, 1791 (31 Geo. 3, c. 32), s. 5; the Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), ss. 12, 13, 14; the Places of Religious Worship Act, 1855 (18 & 19 Vict. c. 81), Title, ss. 1, 10. The decided cases also make it clear that "divine service" is properly used only of the ordinary prescribed service of the Church of England and not of any other service or rite, it having been expressly held that the expression does not apply to any previously authorized service of the Church : *In re Paul Moone* (1) ; to an ordination service : see *Kensit* v. *St. Paul's* (*Dean & Chapter*) (2) ; to the office of preaching : *In re Robinson. Wright* v. *Tugwell* (3); or to the collecting of an offertory : *Cope* v. *Barber.* (4) In the Book of Common Prayer " divine service " is equivalent to morning or evening prayer and includes the whole of the composite service prescribed by authority. Thus, the rubric at the end of the Nicene creed requires that nothing shall be proclaimed or published in the church during divine service but by the minister ; the rubric at the end of the communion service directs that after divine service the offertory shall be disposed to pious and charitable uses ; and the rubric at the beginning of the marriage service requires the banns to be published during the time of morning service or of evening service. As to the section here in question—namely, s. 2 of the Act of 1860, that section consists of two separate parts or limbs, in each of which the expression " divine service " is used. Even as used in the first part of that section the expression does not necessarily mean a service of any kind in any place of worship, but may refer only to the ordinary prescribed service of the Church of England. However that may be, the expression as used in the second part of the section means the ordinary authorized service of the Church of England. This follows from the fact that that part of the section derives its origin from the Act of 1553, s. 3, and subsequent enactments, in all of which the expression had that meaning. It also appears from the use of the expression in that part of the section in contradistinction to the terms " Sacrament . . . . rite or office." Further, in the second part of the section each of the expressions descriptive of a religious ceremony refers to a public ceremony conducted in a church. To say, as is said on behalf of the appellant, that the term " sacrament " denotes a sacrament administered privately, and that a sacrament administered publicly in a church is included in the expression " divine service," is to put a very forced and unnatural construction upon this part of the section. The section deals only with the disturbance of a clergyman celebrating a public service. The only charge that could have been made against the respondents under the second part of the section with any hope of success was that of disturbing a clergyman when ministering a sacrament, but the charge which has been brought against them is that of disturbing, not a sacrament, but divine service. The justices rightly held that the service in question was not a divine service but a sacrament, and that the charge therefore failed.

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(1) (1872) L. R. 7 C. P. 393.

(2) (1898) 62 J. P. 489.

(3) (1887) 18 Q. B. D. 607.

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(1) (1681) See Gibson's Codex, Tit. 14, cap. 1 (vol. i., p. 303, n (*a*) ).

(2) [1905] 2 K. B. 249.

(3) [1897] 1 Ch. 85.

(4) L. R. 7 C. P. 393.

Secondly, the service in question was not "divine service" within s. 2 of the Act of 1860, because it was not valid in law. The expression divine service as there used, whether it applies to a sacrament or not, means a service which is in accordance with the law of the Church of England, and does not apply to any other service, even though it be reverently directed to the worship of God. The Act of 1872 no doubt introduced a shortened and an additional form of service, but neither that Act nor any other Act or authority has sanctioned any other departure from the form of divine service prescribed by the Book of Common Prayer. It is a question of fact and degree to what extent a service must deviate from the authorized service in order to prevent it from being "divine service." A very slight alteration of or omission from the prescribed service may be sufficient: *Newbery* v. *Goodwin* (1), and see *Girt* v. *Fillingham*. (2) The service in question, by reason of the articles, acts and omissions mentioned in paras. 3 to 8 of the special case, deviated so widely from the prescribed form of service as to render it illegal and to prevent it from being divine service within s. 2: *Elphinstone* v. *Purchas* (3); and *Capel St. Mary, Suffolk* (*Rector*) v. *Packard*. (4) According to the view of the appellant even very great deviations do not prevent a service from being divine service. The question whether this service was so different from the prescribed service that it was not divine service was one of fact for the justices, and their finding that it was is conclusive.

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(1) 1 Phillim. 282.
(2) [1901] P. 176, 183.
(3) (1870) L. R. 3 P. C. 245.
(4) [1927] P. 289.

*Vaisey K.C.* in reply. The respondents disturbed a clergyman celebrating " divine service " within the meaning of the second part of s. 2 of the Act of 1860. The material words are " any sacrament, or any divine service, rite, or office, in any cathedral, church, or chapel." It is to be observed that the expression " any sacrament " is separated from the other expressions by the intervening words " or any." That expression as there used is thus independent of the words " in any cathedral, church or chapel," and refers only to a sacrament privately celebrated. The expression " divine service " on the other hand is connected with these latter words and refers to any service publicly conducted in a church, including a communion service. The communion is both a sacrament and a divine service. It cannot be correct to say that it is not a divine service. In several Acts, as for example in the statute 1 Mary, sess. 2, c. 3, and in the Act of 1855, s. 10, the expression " divine service " is used as including any authorized service of the Church of England. As to the second question raised by the respondents, a departure by a clergyman from the authorized form of service, except perhaps where it is grossly offensive, will not justify the interference even of the churchwardens : *Hutchins* v. *Denziloe.* (1) The articles, acts and omissions complained of were not such deviations as rendered the service in question illegal. Most of these acts and omissions did not take place until after the disturbance had ceased.

*Cur. adv. vult.*

Oct. 31. LAWRENCE J. The judgment that I am about to deliver is the unanimous judgment of the Court (LORD HEWART C.J., AVORY and LAWRENCE JJ.).

This is an appeal from a decision of the justices sitting at Penzance dismissing an information against the respondents for that they did disturb Canon Carr, a clergyman in holy orders, celebrating divine service in the parish church of St. Hilary on December 11, 1932, contrary to s. 2 of the Ecclesiastical Courts Jurisdiction Act, 1860, on the ground that the service which Canon Carr was conducting in the said church was not a divine service within the meaning of the said section, because it was the celebration of a sacrament, and because it included in the said celebration the ceremony of the Asperges, the tolling of a sanctus bell, the use of certain vestments and ornaments alleged to be illegal, the use of incense and the elevation of the elements from the altar after consecration, and it omitted the reading of the ten commandments and the exhortation. The disturbance, which consisted of loud singing of hymns by the respondents throughout the whole of the service so as to make the officiating clergyman's voice inaudible, was admitted.

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(1) (1792) 1 Hag. Con. 170.

It was contended before us on behalf of the respondents, firstly, that the service which Canon Carr was conducting was the celebration of a sacrament and not divine service within the meaning of s. 2 of the Act of 1860; and, secondly, that even if the celebration of a sacrament can be divine service within that section, yet the above-mentioned alleged departures from the laws of the Church of England entitled the justices to hold that it was not a divine service within that section.

It was argued that the words "sacrament" and "divine service" are contrasted in the statutes which precede the Act of 1860, in the Rubrics of the Church of England, and in the Canons of 1603, and that, therefore, the words "any sacrament, or any divine service, rite, or office, in any cathedral, church, or chapel" in s. 2 of the Act of 1860 ought to be read as applying to different categories of ceremony and that an information for disturbing the celebration of divine service cannot be supported by evidence of disturbing the celebration of a sacrament.

In spite of the able argument of Mr. Tucker, we are unable to accept these contentions. The words "divine service" are used in the earlier part of s. 2 in their widest sense; and we think that the words in the latter part of the section "any divine service, rite, or office in any cathedral, church, or chapel" were used to cover all the services in the Church of England, including the celebration of the sacraments, and that the special mention of "any sacrament" immediately preceding these words in that section refers to the celebration of any sacrament outside a cathedral, church or chapel. The use of the second word "any" appears to us grammatically to support this view and we do not think that the contrast in the statutes, Canons and Rubrics, to which we were referred, is sufficiently uniform to lead to the interpretation of s. 2 for which the respondents contend: see especially 1 Mar. (sess. 2), c. 3, s. 1 (1553), the penultimate Rubric at the end of the communion service and Canons 18 and 19.

On the second head of the respondents' argument, we are of opinion that it cannot have been intended that an Act providing for summary conviction for brawling should depend for its application upon the difficult questions which have often arisen upon the ceremonial law of the Church of England. The Act was designed to protect the clergyman from disturbance in the performance of his duties and to preserve order, decency and reverence in the church during the performance of those duties; it has no reference to whether he performs them properly, a subject which has always been within the jurisdiction of the Ecclesiastical Courts (see *Newbery* v. *Goodwin* (1)) and on which even the Archdeacon of the Archdeaconry, or the churchwardens of the parish, can only proceed by the method prescribed by ss. 8 and 9 of the Public Worship Regulation Act, 1874.

We are of opinion, therefore, that upon the statement of facts contained in the Case the justices ought to have convicted the respondents, and we accordingly allow the appeal with costs.

*Appeal allowed. Case remitted.*

Solicitors for the appellant: *Sharpe, Pritchard & Co., for Vivian Thomas & Son, Penzance.*

Solicitors for the respondents: *Robbins, Olivey & Lake, for Coulter Hancock & Thrall, Truro.*

J. R.

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(1) 1 Phillim. 282.

## SMITH *v.* YORK RACE COMMITTEE.

1933
*Dec.* 19, 20.

*Revenue—Income tax—Occupation of Land—Exemption of "building" occupied for trade—Adjuncts of building—Racecourse—Buildings used for racing—Adjoining paddocks and lawns—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. B, r.* 1, *proviso* (*b*).

The Income Tax Act, 1918, Sch. B, imposes tax in respect of the occupation of lands, tenements, hereditaments and heritages; and by Rule 1 thereof "Tax under this Schedule shall be charged in addition to the tax to be charged under Sch. A on all the properties in this Act directed to be charged to the said tax . . . . Provided that there shall not be charged under this Schedule— . . . . (*b*) any . . . . building occupied for the purpose of carrying on a trade or profession."

A committee, which carried on the trade of racecourse proprietors, was the occupier under a lease of properties consisting of stands, stables, weighing-room and other buildings, and also of paddocks, lawns and enclosures. The whole of the properties were enclosed and had an extent of approximately eleven acres, of which about three acres were covered by the buildings. It was admitted that the buildings came within the above proviso (*b*):—

*Held*, that the paddocks, lawns and enclosures were not so closely connected with the buildings as also to come within proviso (*b*), and that they were not exempt from tax under Sch. B.

CASE stated by the Commissioners for the general purposes of the income tax for the Division of the City of York.

On March 4, 1932, at a meeting of the Commissioners held at York, the York Race Committee (hereinafter called "the committee") appealed against an assessment of 113*l.*, being one-third of the estimated annual value, made upon the committee under the Income Tax Act, 1918, Sch. B, for the year ending April 5, 1930, in respect of the occupation of lands, tenements, hereditaments and heritages, situated on the Knavesmire within the City of York.

The committee had for many years carried on the trade of racecourse proprietors on the Knavesmire, York.

For the year ending April 5, 1930, the committee was the occupier of properties which consisted of stands, stables, weighing-room, paddocks, lawns and enclosures, situated on the east side of the racing track near the finishing post, and held under a lease for thirty-five years from January 1, 1908, granted by the York Corporation under the York (Micklegate

Strays) Act, 1907, as amended by an agreement dated December 14, 1922. The whole of these properties were enclosed and had an extent of approximately eleven acres, part of which of a total area of approximately three acres was covered by buildings such as stands, stables and weighing-room. The whole was occupied for the purpose of the committee's trade of racecourse proprietors, the profits of which had been charged to income tax under Sch. D.

The committee as occupier of the above mentioned properties was assessed to income tax under Sch. A in the sum of 3200*l.* gross, for the year ending April 5, 1930, and was also rated as occupier for local rating purposes.

The question of the amount of the Sch. B assessment was reserved, the appeal heard by the Commissioners being confined to the issue whether on the facts of the case any assessment at all under Sch. B was due to be made. It was, however, explained to the committee that the amount of 113*l.* assessed was intended to represent one-third of the annual value of the properties after exclusion therefrom of the stands, stables, weighing-room and other buildings, leaving only the paddocks, lawns and enclosures of a total area of approximately eight acres, of which the paddocks, garden and grass in front of stands and enclosures comprised approximately five acres, the remainder being yards and roads of gravel or macadam comprising approximately three acres. None of the grass was suitable for grazing, there being steps and obstacles of various kinds. The ground was not flat, the whole of the paddocks, for instance, being terraplaned from the back wall to the track. The properties in question were well known to the Commissioners who heard the appeal.

The committee was represented by its secretary, who reviewed the Rules of the Jockey Club with which the committee was bound to comply as a condition of obtaining a licence from that Club; informed the committee that that Club did not merely confine its attention to the suitability of the track and accommodation necessary for horses and jockeys, but also supervised the general lay-out of the buildings, stands and enclosures, and the amenities provided for race-goers; mentioned that no plans could be passed which showed tunnels or congested places, that the existence of open spaces round the stands was compulsory, that the Rules directed the provision of a paddock, and that all horses running were required to be brought in whenever a charge was made for the admission of the public to the paddocks; and produced a plan of the properties, on which the properties in question were delimited by a red verge line, no question arising as to the 3*s*. enclosure shown on the west side of the racecourse.

It was contended on behalf of the committee: (*a*) that in the Act of 1918, Sch. B, r. 1, proviso (*b*) (1), the exception in favour of "any warehouse or other building occupied for the purpose of carrying on a trade or profession" covered not only the buildings themselves, but also the paddocks, lawns and enclosures in the same curtilage as the buildings, these adjuncts being essential to the committee's trade and the whole being used for the purpose of racing. (*b*) That in the circumstances of the case there was no liability to assessment to income tax under Sch. B on the part of the committee in respect of the properties referred to.

It was contended on behalf of the Crown: (*a*) That the whole of the properties comprised in the Sch. A. assessment were liable also to assessment under Sch. B, subject only to the exception in proviso (*b*) to r. 1 of Sch. B, in favour of

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(1) The *Income Tax Act*, 1918, provides:

"First Schedule.

. . . . . . . . . . . . . . .

Schedule B.

Tax under Schedule B shall be charged in respect of the occupation of all lands, tenements, hereditaments, and heritages in the United Kingdom for every twenty shillings of the assessable value thereof estimated in accordance with the rules of this Schedule.

. . . . . . . . . . . . . . .

Rules applicable to Schedule B.

1. Tax under this Schedule shall be charged in addition to the tax to be charged under Schedule A on all the properties in this Act directed to be charged to the said tax according to the general rule of No. 1. of Schedule A:

Provided that there shall not be charged under this Schedule—

(*a*) any dwelling-house or the domestic offices thereunto belonging, unless occupied, by virtue of one and the same demise, together with a farm of lands, or with a farm of tithes, for the purpose of farming the same; or

(*b*) any warehouse or other building occupied for the purpose of carrying on a trade or profession."

"any warehouse or other building occupied for the purpose of carrying on a trade or profession." (*b*) That the exception aforesaid applied only to buildings such as the stands, stables, and weighing-room, and did not extend to the substantial areas of paddocks, lawns and enclosures. (*c*) That, subject to the question of its amount, the assessment under Sch. B should be confirmed.

The Commissioners considered that the interpretation of Sch. B, r. 1, proviso (*b*), contended for on behalf of the committee was correct and that the paddocks, lawns and enclosures fell within the description "other building occupied for the purpose of carrying on a trade or profession," and they therefore allowed the appeal and discharged the assessment.

The only question for the opinion of the Court was whether the Commissioners had rightly interpreted the words "other building occupied for the purpose of carrying on a trade or profession" in proviso (*b*) aforesaid, as applying to the paddocks, lawns and enclosures occupied by the committee.

*Sir D. B. Somervell S.-G.* and *R. P. Hills* for the appellant.
*A. M. Latter K.C.* and *J. H. Bowe* for the respondents.

FINLAY J. This case, which is certainly not entirely free from difficulty, relates to a dispute between the Revenue and the respondents, a body called the York Race Committee, who conduct from time to time race meetings on a racecourse at York. The property of the respondents consists of the racecourse itself, two paddocks, lawns and enclosures and also of a number of buildings, including stands, stables, weighing-room, and refreshment rooms attached to the course and forming part of the property. The case finds that these various properties extend approximately to eleven acres, of which three acres were covered by the buildings, that the whole eleven acres were occupied for the purpose of the respondents' trade of racecourse proprietors, and that the respondents in respect of the profits of their trade are chargeable to income tax under Sch. D.

The question which arises is a question with regard to the assessment to Sch. B of that part of the eleven acres which is not covered by buildings, that is to say, about eight acres consisting of paddocks, lawns and enclosures. Tax under Sch. B is " in respect of the occupation of all lands, tenements, hereditaments, and heritages in the United Kingdom." Rule 1 of the schedule, however, contains two provisoes, which except certain properties from tax under the schedule, and the precise question is whether the last-mentioned items of the respondents' property come within the exceptions. Proviso (*b*), with which we are immediately concerned, states that there shall not be charged under the schedule " any warehouse or other building occupied for the purpose of carrying on a trade or profession."

At first sight, the answer to the question raised seems perfectly simple. On seeing that there is, for instance, a lawn, one says that whatever that lawn may be, it certainly is not a building. It has been argued, however (and of course the argument deserves careful consideration), that the Commissioners made no error in law, and that, having regard to the construction which ought to be put upon proviso (*b*), they were entitled to arrive at the conclusion that " building " as there used meant not merely the four walls and roof of a building, but also the adjuncts, courts, and things of that sort occupied with the building and for the necessary use of the building. It is also said that whatever criticism the view of the Commissioners was open to, nevertheless it was a finding of fact with which this Court could not interfere.

The first thing to ascertain is whether the Commissioners correctly directed themselves in point of law. The direction they gave themselves appears from the case. It is there said in paragraph 9 that the Commissioners considered that the interpretation of proviso (*b*) contended for on behalf of the race committee was correct. That interpretation is expressed in this way in paragraph 7: " That the exception in favour of ' any warehouse or other building occupied for the purpose of carrying on a trade or profession ' covered not only the buildings themselves, but also the paddocks, lawns and enclosures in the same curtilage as the buildings, these adjuncts being essential to the committee's trade and the whole being used for the purpose of racing." It seems to me that the contention was there being put forward, that if there was a building and also a lawn both being used for the purpose of the trade of conducting race meetings, then both lawn and building fall within the exception. That cannot possibly be right. It is perfectly clear that it is not sufficient that the lawn should be used for the purpose of the trade. What is essential is that the lawn should be a building, and, construing the proviso as favourably as it can be construed for the respondents, I think the most that could be said would be that "building" must cover adjuncts, that is to say, a courtyard or something necessarily used in connection with the building. The view which the Commissioners accepted is not merely wider, but infinitely wider than that.

That leads me to notice an argument which was urged before me on behalf of the respondents. It was said that a generous construction must be given to the word "building," otherwise double taxation would arise. To that contention two answers were given by the Solicitor-General. His first answer was that it proved a great deal too much, because there might be an area of land used in connection with the trade which had no possible connection with any building, and the difficulty, if difficulty it be, would arise with regard to that. That is I think a sufficient answer to that argument. I do not, however, desire to go here into any question of double taxation which might arise in a suitable case. I am not prepared to give effect to the view which has been urged, because it seems to me that, if carried out fully, it would involve this, that all land used for the purpose of the trade was entitled to come within the exemption. That cannot possibly be right.

The Commissioners, I think, failed to observe that anything outside the four walls of the building that was to come within the exemption, must be an adjunct to the building. I do not here propose to decide anything with regard to various instances which were suggested, such as that of a factory with a forecourt used for loading. It may well be that in cases of that sort the "building" would include something beyond the four walls. It would include the court necessary for the proper use of the building, which would be, in the strict sense, an adjunct to the building.

My attention was called to several cases in different branches of the law which show that the construction that not merely the four walls of a building, but things which are adjuncts to the four walls, and necessary for use in connection with the building, may fall to be exempted as part of the building is a construction which may often properly be adopted, and nothing that I am saying here will preclude that construction being adopted in connection with the use of the word "buildings." But here I think one has only to look at the facts to see at once that the lawns and enclosures cannot possibly be regarded as adjuncts of the buildings. I think that the Commissioners, for reasons which I have tried to explain, misdirected themselves in point of law. I further think that, if they did not misdirect themselves in point of law, they were mistaken in fact in finding that these lawns and enclosures were buildings, there being no evidence which could justify such a finding.

On these grounds I feel bound to differ from the view which was taken in the case by the Commissioners, and the result is that this appeal will be allowed.

*Appeal allowed.*

Solicitor for appellant: *The Solicitor of Inland Revenue.*
Solicitor for respondents: *Charles Russell & Co.*

J. R.

1933
*Dec.* 11.

# WILLIAMS (Inspector of Taxes) *v.* TRUSTEES OF W. W. GRUNDY.

*Revenue—Income Tax—Additional Assessment—Inspector of Taxes—Discovery that profits were omitted from first Assessment—" Discovers "—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 125, *sub-s.* 1.

Trustees under a will in making a return to income tax of the trust income stated in error but in good faith that by reason of the provisions of the will, which they misread, the income was not liable to income tax, and after production of the will and full discussion with them the inspector of taxes agreed, and no assessment was made. His successor discovered this error and additional assessments were made on the trustees in respect of the above income :—

*Held,* that the inspector (who was treated as if he were the first inspector) had " discovered," within the meaning of s. 125, sub-s. 1, of the Income Tax Act, 1918, that profits chargeable to tax had " been omitted " from the first assessments within the meaning of s. 125, sub-s. 1, of the Income Tax Act, 1918, notwithstanding his failure to discover it at the time of the first assessments, and that, consequently, the commissioners had power to make the additional assessments.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts under s. 149 of the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40).

At a meeting of the commissioners on February 22, 1933, the respondents, Helena Rigby Grundy, John Thomas Furber and Frederick Redmond, trustees of W. W. Grundy, deceased (" the trustees "), appealed against additional assessments made in respect of the interest on registered 5 per cent. War Stock, under Case III. of Schedule D to the Income Tax Act, 1918, being on the sum of 35*l.* 15*s.* for the year 1928–29, 358*l.* 5*s.* for 1929–30, 417*l.* 15*s.* for 1930–31, and 449*l.* 5*s.* for 1931–32. The testator, the said W. W. Grundy, died on December 26, 1926, and by his will he appointed the respondents his executors and trustees. After certain legacies, he devised and bequeathed the residue of his estate " to my trustees . . . . upon trust to sell call in and convert the same into money [and] . . . . stand possessed of the proceeds in trust for my . . . . grandson Robert Wilson Appleton if and when he shall attain the . . . . age of twenty-one years, but if my said grandson shall not attain the said age of twenty-one years" then on other trusts.

Interest on the War Loan was not deductible at source (s. 49, sub-ss. (1) and (2), of the Income Tax Act, 1918), and was chargeable under Schedule D, Case III, r. 1 (*f*), and by s. 46, sub-s. 1, of the Act of 1918, was exempt from tax "so long as it is shown . . . . that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom."

The said Robert Wilson Appleton, who was a minor, was an American subject and resident in the United States, and not ordinarily resident in the United Kingdom, but the said beneficial interest under the will being contingent and not the subject of "beneficial ownership" within the sub-section, the trustees would not be entitled to the exemption conferred thereby.

The whole of the income of the trust was accumulated by the trustees, and part thereof invested in War Loan as above. In August, 1927, probate of the will and a copy of the will were forwarded by the trustees to the inspector of taxes at Wallasey, and in April, 1929, they made an income tax return for 1929–30. They referred therein to the above interest, but added a note that the income was not taxable [by reason of the said s. 46, sub-s. 1, of the Act of 1918] and formed part of the residuary estate, and that the income was held in trust for Robert Wilson Appleton, a domiciled American "until he attains the age of twenty-one years." This error, which made the interest under the will a vested interest and therefore exempt from tax, was made bona fide. The liability of the trustees to income tax was fully discussed between them and the said inspector in connection with an additional assessment for 1928–29, and, as a result, the additional assessment was not made. The same procedure was pursued with regard to additional assessments for 1929–30, 1930–31 and 1931–32.

In December, 1931, the said inspector of taxes was succeeded by the appellant, and he came to the conclusion that the trustees ought to have been assessed in respect of the above sums, and accordingly under s. 125, sub-s. 1, of the Income

Tax Act, 1918, the additional assessments appealed against were made.

By s. 125, sub-s. 1, aforesaid "If the surveyor discovers—that any properties or profits chargeable to tax have been omitted from the first assessments; or that a person chargeable has not delivered any statement, or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessments . . . . then and in every such case . . . . (ii) where the tax is chargeable under Schedule D" an additional assessment may be made.

It was contended for the trustees that the inspector had not made any "discovery" within the meaning of s. 125, sub-s. 1, and that consequently, there was no jurisdiction to make the additional assessments.

The commissioners, in allowing the appeal of the trustees, said "It is not disputed that in this case the facts were completely made known at the time to the Inland Revenue by the appellant trustees and were fully examined by both sides. The then inspector of taxes formed an opinion on those facts and acted upon his opinion. A new inspector of taxes has since re-examined the same facts and formed a different opinion. These being the circumstances of this case we hold that there has been no discovery within the meaning of s. 125 of the Income Tax Act, 1918."

The commissioners stated this case.

*Sir Thomas Inskip A.-G.* and *R. P. Hills* for the appellant. The appellant "discovered" within the meaning of s. 125, sub-s. 1, of the Income Tax Act, 1918, when it came to his knowledge that the statements made to his predecessor by the respondents were insufficient or incorrect. It makes no difference that there were different inspectors. No mala fides on the part of the trustees is suggested. It is urged on their behalf that all the facts—i.e., a copy of the will—were placed before the first inspector, and that is admitted; but he may have looked at it with an unseeing eye, and not have directed his mind to the real point, and as soon as he or his successor did so and ascertained the real facts there was a

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" discovery." " Discovers " means " comes to the conclusion from the examination he makes "—per Bray J. in *Rex* v. *Kensington Income Tax Commissioners*. (1) And Avory J. in the same case said (2) that it means " has reason to believe." Lush J. said (3) it is equivalent to " finds " or " satisfies himself." That case was reversed (4) but not on this point. There is a " discovery " if, a mistake having been made, one finds out the truth, and apparently it does not matter whose mistake it was—see per Lush J. in *Rex* v. *Kingsland*. (5)

[*Haythornthwaite and Sons* v. *Kelly* (6) was also referred to.]

The inspector need not discover new facts to constitute a " discovery," it is sufficient if he finds that a proper interpretation has not been given of the facts. The sub-section does not say " discovers a new fact or document." The above cases make it clear that the inspector is not in the position of a judicial officer whose decision on a matter makes it res judicata or binding on the Crown as a matter of contract : see per Rowlatt J. in *Anderton and Halstead, Ld.* v. *Birrell*. (7) It is not for him to decide whether it is a good assessment—per Pollock M.R. in *Ingle* v. *Farrand* (8)—that is for the commissioners.

[*Beynon* v. *Thorpe* (9) was also referred to.]

*Eric Errington* for the respondents. The inspector did not " discover " within the meaning of s. 125, sub-s. 1, of the Act of 1918. " Discover " does not include a mere change of opinion on the same facts—per Rowlatt J. in *Anderton and Halstead, Ld.* v. *Birrell* (10) and that is what happened in this case, for the inspector had no new facts before him. And Rowlatt J., in the last-cited case, said (10) " How greatly it

(1) [1913] 3 K. B. 870, 889; 6 Tax Cas. 279, 283.

(2) [1913] 3 K. B. 897; 6 Tax Cas. 289.

(3) [1913] 3 K. B. 898; 6 Tax Cas. 290.

(4) [1914] 3 K. B. 429; 6 Tax Cas. 613.

(5) (1922) 8 Tax Cas. 327, 330.

(6) (1927) 11 Tax Cas. 657, 664.

(7) [1932] 1 K. B. 271, 279; 16 Tax Cas. 200, 207.

(8) [1925] 2 K. B. 728, 733; 11 Tax Cas. 446, 456. Reversed by H. L. [1927] A. C. 417; 11 Tax Cas. 446.

(9) (1928) 14 Tax Cas. 1, 12.

(10) [1932] 1 K. B. 271, 281; 16 Tax Cas. 200, 208.

would have simplified the problem if it could have been said that the inspector makes a 'discovery' if he merely changes his opinion, without any new information at all?" That shows that Rowlatt J. thought it could not be said. When in the succeeding passage Rowlatt J. refers to "something which had been overlooked" he is referring to a fact overlooked, not the law.

[*National Pari-Mutuel Association, Ld.* v. *Regem* (1) was also referred to.]

There can only be discovery where the inspector becomes acquainted with a fact which existed at the time when the original assessment was or could have been made, but which was not then known to him. There cannot be a discovery of law. The trustees and the inspector agreed this matter after a full discussion of the facts as they have always existed and it will be a great hardship if the matter is to be reopened, no fraud being suggested.

*Sir Thomas Inskip A.-G.* in reply. Apart from authority, the words of s. 125, sub-s. 1, are clear: "If the surveyor discovers—that any properties or profits . . . . have been omitted." That discovery was made here, and it is immaterial that it was not made earlier, as it could have been. The inspector, in making an agreement, cannot bind the Crown: *Liberty and Co., Ld.* v. *Inland Revenue Commissioners* (2) per Rowlatt J.

FINLAY J. In this case, notwithstanding the skilful argument of Mr. Errington, an argument which lost nothing from its brevity, I have arrived at a conclusion which differs from that of the special commissioners. When I differ from the special commissioners, I do so with hesitation.

The way the matter arises is this: Certain additional assessments were made upon certain trustees and they were made in respect of 5 per cent. War Stock. It is a familiar circumstance with reference to that particular stock that it is not liable to tax if in the beneficial ownership of a person resident abroad. The stock in question was left to a young gentleman, Robert Wilson Appleton, who is resident in the United States; it was left for his benefit, but it was left on the terms that the trustees were "to stand possessed of the proceeds in trust for my said grandson, Robert William Appleton, if and when he shall attain the age of 21 years and if my said grandson shall not attain the age of 21 years then in trust as to both capital and income . . . ." Now, what happened in these circumstances was that the whole of the income was received and accumulated by the trustees in England. In August, 1927, the testator having died in 1926, probate and a copy of the will were forwarded to the then inspector of taxes at Wallasey. In April of 1929, the trustees made an income tax return. They referred to the interest received by them on their holding of registered War Stock, but added a note that the income was not taxable and formed part of the residuary estate, and that the income was held in trust for Mr. Appleton, a domiciled American, until he attained the age of twenty-one years. That was followed by a statutory declaration by one of the trustees that young Mr. Appleton was the beneficial owner of the War Stock and was entitled to the interest thereon. Now, all that was a mistake and is admitted to have been a mistake, because the grandson was, under the will, to benefit "if and when" he should attain the age of twenty-one years, while the inspector was informed that the property was held in trust for the grandson "until" he attained that age. But there was not the slightest attempt to deceive; the whole matter was discussed, and fully discussed, between the trustees and the inspector of taxes. The question arose as to the making of an additional assessment for the year 1928–29, and, as the result of this discussion, the inspector of taxes intimated that the proposed assessment would not be made. The trustees continued to make returns for the subsequent years, for 1930–31 and 1931–32, and on those returns it was stated that the income was not taxable and was being held in trust for Mr. Appleton until he attained twenty-one years of age. Subsequently, a new inspector of taxes came into the district and he came to the conclusion, and, as it is admitted, he rightly came to the conclusion that the trustees had been liable to assessment to income tax in respect of the interest. He rightly came to that conclusion, because, as is now admitted, the interest of young Mr. Appleton in this fund was a contingent interest only. I do not attach importance, from the point of view of the actual decision of the case, to the circumstance that the inspector of taxes was different. It would have been, in my opinion, the same thing if the old inspector of taxes, on a resurvey of the facts in the light of fuller knowledge, had changed his opinion.

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(1) (1930) 47 Times L. R. 110.

(2) (1924) 12 Tax Cas. 630, 639.

In these circumstances, additional first assessments were raised for the years 1928–29, 1929–30, 1930–31 and 1931–32; an appeal was made against those assessments and the appeal came before two very experienced special commissioners, Mr. Sanders and Mr. Jacob, and they gave their finding in this way: "It is not disputed that in this case the facts were completely made known at the time to the Inland Revenue by the appellant trustees and were fully examined by both sides. The then inspector of taxes formed an opinion on those facts and acted upon his opinion. A new inspector of taxes has since re-examined the same facts and formed a different opinion. These being the circumstances of this case we hold that there has been no discovery within the meaning of section 125 of the Income Tax Act, 1918."

The matter to my mind turns upon a correct interpretation of that section. It is not necessary to go through the sections, beginning with s. 100, sub-s. 1, which requires the delivery of the statement; s. 119, sub-s. 1, which gives the surveyor power to examine the assessments and the statement; s. 121, sub-s. 1, which lays down that Schedule D assessments are to be laid before the additional commissioners and gives power to the surveyor by sub-s. 3 (*b*) to make an objection if he likes; and s. 122, which requires the additional commissioners to enter their assessments in books and requires that the general commissioners shall allow and confirm the assessments. So far as to the first assessment. Then we come to the additional assessment and the provision with regard to that, upon which the whole case turns, is in s. 125. It is best to read the words first. By sub-s. 1: "If the surveyor discovers—that any properties or profits chargeable to tax have been omitted from the first assessments ; or that a person chargeable has not delivered any statement, or has not delivered a full and proper statement, or has not been assessed to tax, or has been undercharged in the first assessments ; or that a person chargeable has been allowed, or has obtained from and in the first assessments, any allowance, deduction, exemption, abatement, or relief not authorised by this Act, then and in every such case . . . . (ii) where the tax is chargeable under Schedule D, the additional commissioners shall make an assessment, on the person chargeable, in an additional first assessment, in such a sum as, according to their judgment, ought to be charged . . . . " It will be observed that the surveyor is the person who has got to discover and upon his discovery, not he, but the additional commissioners have got to make an assessment.

This section has been the subject of judicial consideration in several cases. I may refer to the case of *Rex* v. *Kensington Income Tax Commissioners*. (1) It is proper to mention that this decision was subsequently reversed (2), but reversed upon other points, and nothing in the reversal affects the particular point with which I am dealing. The matter is discussed by all three judges in the judgment. I think it is only necessary, though I might cite several passages, to read a passage from the judgment of Bray J. (3) He says there : (in the report in Tax Cases) (3) : " The whole question we have got to consider seems to be what is the meaning of the word ' discovers.' Now the word ' discovers ' has several meanings. If I discover a needle in a bundle of hay, I then see it and there is no doubt about it ; but, on the other hand, that is not the only meaning of the word ' discover,' and the question is, what is the meaning of it here ? Does it mean, as is suggested by Mr. Danckwerts : ' Ascertain by legal evidence ? ' " A few lines further down he says : " This is not the time for legal evidence, and it seems to me to be quite clear that the

(1) [1913] 3 K. B. 870 ; 6 Tax Cas. 279.

(2) [1914] 3 K. B. 429 ; 6 Tax Cas. 613.

(3) [1913] 3 K. B. 889 ; 6 Tax Cas. 282.

word ' discover ' cannot mean ascertain by legal evidence; it means, in my opinion, simply ' comes to the conclusion ' from the examination he makes, and, if he likes, from any information he receives." There seems to be little doubt that if " discover " means coming to the conclusion from his (the inspector's) examination, that passage applies here. There are other cases; I need not refer to them all, but in *Haythornthwaite and Sons* v. *Kelly*, Lord Hanworth M.R. lays down the law (1), and lays it down, I think, in precise accordance with the views which had been expressed by Bray J. What he says is this: " It is to be observed that that period of six years may, and I daresay in some cases does, put a very serious burden indeed upon the subject, because it means this, that although the subject may have cleared up his income tax—I use rather a neutral word—five years before, yet he is still liable to have a further assessment made upon him for a period which does not expire until six years after the expiration of the year of assessment." The view indicated by the Master of the Rolls in that judgment seems to me to be in accordance with the view indicated by the Divisional Court in the case of the *Kensington Income Tax Commissioners* (2) to which I have already referred. So far, the matter would appear to be reasonably clear. Here is a question whether an interest is vested or is contingent. If vested, one view prevails; if contingent, another; and quite obviously the matter is one on which even persons of intelligence, applying their minds to the facts, might arrive at an erroneous conclusion; and both parties here quite honestly did arrive at an erroneous conclusion, with the result, of course, that there was an escape from tax. Now, the argument very clearly put by Mr. Errington for the respondents in answer to the argument of the Attorney-General was this: He said: " Well, discovery means the finding out of some fact, the fact being one which did, in truth, exist at the time, but was not known to the inspector," and he cited a passage from the judgment of Rowlatt J. in the case of *Anderton and Halstead, Ld.* v.

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(1) 11 Tax Cas. 657, 664.
(2) [1913] 3 K. B. 870; 6 Tax Cas. 279.

*Birrell* (1)—and how anxiously one considers everything that Rowlatt J. says, I need not say. The facts of that case differ widely from the facts in the present case because there the question was this: There had been an allowance in respect of bad debts and the inspector suggested, not in the light of a new discovery about the time, but in the light of some fact which he had discovered years after as to the treatment of their debts by the company, that he had discovered that the allowance was erroneous. It was held by Rowlatt J. that that was not correct, and there is one sentence in his judgment which undoubtedly has given me anxiety, because he says this (1): "But the mere fact of such a discussion of the means of ascertainment indicates an assumption that there was something to be ascertained somehow. How greatly it would have simplified the problem if it could have been said that the inspector makes a 'discovery' if he merely changes his opinion, without any new information at all?" He goes on with a sentence which rather tends, I think, to favour the view which I take, if it has any bearing, in this way: "Moreover, it is to be remembered that income tax is an annual tax for the service of the year, and when one finds a provision for an additional assessment within a period of six years one is led to expect machinery, not for a mere revision, but for the bringing in of something which had been overlooked." With regard to the latter words I should say that in the case before me there was the bringing in of something which had been overlooked, the something which had been overlooked being that the interest of this young gentleman was not vested but was contingent. But, undoubtedly, the earlier words do, I frankly agree, lend weight to the argument which was so well urged upon me by Mr. Errington. I have, however, come to the conclusion upon a survey of the authorities as a whole—and one must look at them as a whole—that it must not be supposed that Rowlatt J. there was speaking otherwise than with reference to the facts of the particular case which was before him. Clearly one would think there could be no doubt as to the correctness of the result of that case, but I do not find it possible to apply the words I have quoted to every case in the sense of reading them as meaning that an inspector can never make a discovery if the making of that discovery involves only a change of opinion. I cannot think that that was what was meant and it does not seem to me that that view is consistent with the authorities to which I have already referred.

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(1) [1932] 1 K. B. 271, 281; 16 Tax Cas. 200, 208.

There are only two other things that I desire to say. One is this: Quite naturally, my attention was called and forcibly called to the inconvenience which might arise in cases of this sort where additional assessments are made, perhaps five years, after the original assessment. I do not think I can give effect to that argument, because nothing is better settled than the principle that there is no estoppel as against the Crown. I do not doubt that in some cases very real inconvenience might be caused by an additional assessment made five years after the event, but, as I have said, that is a matter which I am not entitled to take into account. The other thing which I would say is this: I have carefully considered the authorities, but, apart from the authorities, if one looks at s. 125 itself, it is rather difficult to say that on the facts of this case the surveyor had not discovered, found out, that there were properties or profits chargeable to tax which had been omitted from the first assessments. He did, I think, find out that fact. The fact is, of course, that the properties or profits were chargeable to tax; they had been omitted from the first assessments and he found that out. The only answer made to this is that they had been omitted from the first assessment, so to speak, with the sanction of the inspector, because he, like those making the return, supposed that they were not properties or profits chargeable to tax. But of course an inspector would have no power to sanction such an omission. He discovers, he finds out, that they are chargeable, and I have difficulty in seeing why s. 125 does not then precisely apply.

Upon these grounds I think that this appeal succeeds.

*Appeal allowed.*

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Gasquet, Metcalfe & Walton, for Radcliffe-Smith, Abercromby & Co., Liverpool.*

W. L. L. B.

# HEASTIE (H.M. INSPECTOR OF TAXES) v. VEITCH AND COMPANY.

K. B. D.
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*July* 20.

C. A.
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*Nov.* 30.

*Revenue—Income Tax—Partnership—Tenancy of property granted by one partner to the partnership—Rent in excess of Schedule A Assessment—Fair and proper rent—Right to deduct rent in computing the profits or gains of the partnership—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 3 (*c*); *r.* 5, *sub-r.* 1; *r.* 10—*Finance Act*, 1926 (16 & 17 *Geo.* 5, *c.* 22), *Fourth Schedule.*

When under the terms of a partnership deed one of the partners permitted the partnership to have the use and occupation of premises for the partnership business on the partnership paying to him a rent which, although in excess of the net Sch. A assessment in respect of the premises, had been found by the Commissioners for the special purposes of the Income Tax Acts to be a fair and proper rent:—

*Held*, by the Court of Appeal (reversing Finlay J.'s decision), that in computing the profits or gains of the partnership for the purposes of assessment to income tax under Sch. D of the Income Tax Act, 1918, the rent was properly allowed as a deduction, having regard to r. 3 (*c*) of the Rules applicable to Cases I. and II.

APPEAL from the decision of Finlay J. on a case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the special purposes of the Income Tax Acts.

At a meeting of the Special Commissioners held on October 31, 1932, Veitch & Co. (hereinafter called the respondents) appealed against an assessment to income tax in the sum of 3800*l*. for the year ending April 5, 1932, made upon them under Case II., Sch. D, in respect of the profits arising to them from their business as chartered accountants.

Mr. Horace Johnston Veitch and Mr. Gordon Scot Simmonds have since April 1, 1926, carried on, in partnership, the business of chartered accountants, at 9 Coleman Street, in the City of London, under the style of Veitch & Co.

Prior to September 19, 1928, there was no written partnership agreement but since that date the terms of the said partnership have been governed by a deed of partnership dated September 10, 1928.

By clause 4 of the said deed, provision is first made for the introduction of capital into the said business by the said H. J.

Veitch (in the said deed referred to as "the senior partner") and also conditions are laid down under which further capital may from time to time be contributed by either the senior partner or the said G. S. Simmonds (in the said deed referred to as "the junior partner") and provisions are included regulating the manner in which such capital is to be dealt with in the books and accounts of the partnership and the charging of interest on such capital. The said clause 4 continues as follows: "The said senior partner having recently purchased the leasehold interest of the said premises, 9 Coleman Street, shall hold the same to permit the partnership to have the use and occupation thereof for the partnership business for so long as he in his sole discretion as senior partner shall deem fit, and the partnership shall during such user of the said premises pay to the said senior partner the sum of 1250*l.* per annum as rent by equal quarterly instalments on the four usual quarter days . . . . and the partnership shall, during such period as such premises shall be used for the business of the partnership, pay and discharge all rates, taxes, insurance, assessments, impositions, and other outgoings in respect of such premises other than the ground rent thereof and shall keep the said premises in full and substantial repair and decorative condition . . . ."

The said clause 4 after making provision with regard to certain premises at Manchester (as to which no question arises) provides for the following matters—namely: The discharge of the debts of the business as at March 31, 1928, in part by the senior partner and in part by the firm, the indemnification of the junior partner against losses during the first three years of the partnership and the sharing of losses thereafter except as to those losses occasioned by the wilful neglect or default of either of them and the charging of a salary to the junior partner in the accounts before the ascertainment of the profit or loss in any year.

The whole of the said premises, 9 Coleman Street, were occupied by the respondents for the purposes of the partnership business. The net Sch. A assessment in respect of 9 Coleman Street, is 705*l.*

The respondents claimed that the rent of 1250*l.* formed a proper deduction in arriving at their profits for the purposes of assessment to income tax under Case II. of Sch. D, as money wholly and exclusively laid out or expended for the purposes of the partnership business, but this claim was not admitted by the Inspector of Taxes.

The assessment under appeal was based on the profits shown in the respondents' balance sheet and profit and loss account for the year ending March 31, 1931. In the profit and loss account the said rent of 1250*l.* appears as a debit item, and the said rent is credited to the capital account of the senior partner, Mr. H. J. Veitch, in the balance sheet.

Mr. H. J. Veitch was called as a witness before the Special Commissioners and proved the following facts:

(*a*) the deed of partnership dated September 19, 1928, governed the business relations between the partners and the partnership was carried on in accordance therewith;

(*b*) clause 4 of the deed was always treated by both partners as an enforceable covenant for the payment of a rent of 1250*l.*;

(*c*) the accounts for the year ending March 31, 1931, were bona-fide accounts and the entries therein relating to the said rent were bona-fide entries;

(*d*) the rent of 1250*l.* was a fair and proper rent for 9 Coleman Street. It was, in fact, the rent which he was asked to pay by the previous owners in 1926 if he decided to rent the premises instead of purchasing the leasehold interest;

(*e*) he acquired the said lease of 9 Coleman Street in March, 1926, for 10,000*l.*, and there was a ground rent of 400*l.*;

(*f*) that in pursuance of the covenant contained in clause 4 of the partnership agreement, the respondents had expended money on rates, insurance, repairs and decorations, and such expenditure had been admitted by the Revenue as a proper deduction in arriving at the respondents' profits for income tax purposes;

(*g*) that the partnership was assessed to income tax Sch. A as the occupier of the premises and he, Mr. Veitch, had been debited in the partnership books with the income tax so paid by the partnership;

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(*h*) that the method of payment of the rent in the year ending March 31, 1931, was as follows:

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|---|---|
| During the course of that year the private drawings of Mr. Veitch amounted to . . . . . . . . | 4796*l.* |
| His share of the profits of that year, including interest on his capital, was ultimately found to be . . . . . . . . . . . . . . . . | 2639*l.* |
| He had therefore overdrawn to the extent of . | 2157*l.* |
| Against the sum of 2157*l.* thus due from Mr. Veitch to the partnership was set off the sum of 1250*l.* due from the partnership to Mr. Veitch for rent of the business premises, leaving Mr. Veitch overdrawn to the extent of . . . . | 907*l.* |

Mr. G. S. Simmonds corroborated Mr. Veitch's evidence.

It was contended on behalf of the respondents, that:

(*a*) the said rent of 1250*l.* was a fair and proper rent for 9 Coleman Street;

(*b*) that the said rent was money wholly and exclusively expended for the purposes of the partnership business and as such was a proper deduction in arriving at their profits for the purposes of assessment under Case II. of Sch. D;

(*c*) that the circumstance that one of the partners was the owner of the premises did not defeat the right to such a deduction;

It was contended on behalf of the Crown that:

(*a*) under r. 10 of Cases I. and II. of Sch. D, although the assessment was to be in the partnership name the tax was charged in respect of the profits arising to Mr. Veitch and Mr. Simmonds from the profession carried on by them jointly;

(*b*) the crediting of the said sum of 1250*l.* to the account of Mr. H. J. Veitch was not an expenditure or disbursement laid out by Mr. Veitch and Mr. Simmonds for the purpose of their said profession, but was an adjustment between them as partners on account of their respective shares or interests in the profits of the profession in accordance with clause 4 of the partnership deed;

(*c*) The assessment should be computed on the basis of disallowing as a deduction the said sum of 1250*l.* and substituting therefor the appropriate deduction representing the annual value of the premises in question (namely 705*l.*) under r. 5 of Cases I. and II.;

(*d*) The assessment was correct and should be confirmed. Alternatively:

(*e*) The only disbursement or expense which could be said to have been incurred by either party for the purpose of the profession was Mr. Simmonds' share (namely one-tenth) of the said sum of 1250*l.*, and consequently the appropriate deduction for the purpose of the assessment was one-tenth of 1250*l.* plus nine-tenths of the said annual value of 705*l.*, making a total deduction of 760*l.*, in which event the assessment should be reduced to 3745*l.*

Having considered the evidence and arguments adduced before them, the Special Commissioners held that 1250*l.* was a fair and proper rent for 9 Coleman Street, and was a proper and admissible deduction in computing the profits of the respondents under Case II. of Sch. D, and they reduced the assessment to 3255*l.*

*Sir T. Inskip A.-G.*, *J. H. Stamp* and *R. P. Hills* for the appellant.

*T. N. Donovan* for the respondents.

FINLAY J. In this case, notwithstanding the extremely able argument of Mr. Donovan, I have come to the conclusion that I ought to differ from the view which has been taken by the very experienced Special Commissioners who heard the case.

The case is a peculiar one and arises in this way. Two gentlemen, Mr. Veitch and Mr. Simmonds carried on business in partnership as accountants. They made substantial profits in the business and they were assessed as a partnership to income tax on these profits under Sch. D, Case II. They carried on their business in premises at 9 Coleman Street, in the City of London, which were assessed under Sch. A on an annual value of 705*l.* Those premises belonged to the senior partner, Mr. Veitch, and in the deed of partnership there was a provision

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whereby he was to allow the firm to use these premises for carrying on the business of the partnership, and he was to be paid for them by the partnership a rent of 1250*l.* There was evidence before the Special Commissioners, which they accepted, that 1250*l.* was a fair and proper rent for the premises. I suppose the remarkable divergence between the Sch. A assessment of 705*l.* and the rent of 1250*l.* is due to the circumstance that in London the annual value is computed in a special way. There is there apt to be considerable divergence between rent and annual value, and that has given rise to a difficulty which has been discussed in several cases lately, and was prominent in the *Salisbury House* case (1) and which cannot arise except in London.

Turning to the Act, one finds that the general position is quite clear. Rule 5 of the Rules applicable to Cases I. and II. of Sch. D expressly authorizes the deduction of the annual value of lands occupied for the purpose of trade. There is no difficulty about that. It is clear, and it is not questioned, that to that deduction the respondents here are entitled. But there is also a rule—namely, r. 3 of the said Rules, with regard to which a dispute arises. That rule is in form a prohibition, but it has been said by a great authority that though in form a prohibition it is really an allowance, and in effect allows disbursements incurred wholly and exclusively for the purpose of the business. If this rent, which is found to be a proper rent, were paid to an outsider, it would I think be deductible and deductible as a disbursement, and it would be immaterial that there was a wide divergence between the rent, and the annual value. That divergence would afford no answer if the rent were paid to an outsider. But what is said here, and, I think correctly said, on behalf of the Crown is that that cannot apply where one is dealing with a partnership and where, so to speak, two partners pay and one receives. Here what really happened was this, that a partner provided what is, I suppose, in effect capital; he provided premises for the use of the firm. If he had provided capital in the form of money it would be clear beyond any doubt that the interest paid in respect of that could not form a deduction. So, I suppose, if he provided a motor-car, or gave services of a special character, a payment in respect of any of those matters could not be deducted. These cases illustrate the situation, which I think is clear. I put it to counsel and they assented, and I do not imagine it can be disputed, that where there is a salaried partner his salary is not a deduction to be made before computing the profits of the partnership. It would be otherwise, of course, in the case of a company paying salaries to its servants and officials.

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(1) *Fry* v. *Salisbury House Estate, Ld.* [1930] A. C. 432.

In this case, accepting, as I need hardly say I accept absolutely, the finding of the Special Commissioners that this was a fair and proper rent, I have come to the conclusion that, none the less, the deduction must be restricted to the annual value. The ground for that is that while the annual value can, of course, be deducted under r. 5, this rent cannot be deducted as a disbursement under r. 3, because it is simply a payment made by the two partners to one of them, and made in respect of special matters, in this particular case business premises, which have been supplied for the use of the firm by that partner.

Upon that ground, though not without hesitation, appreciating as I do the very able way in which this case was argued on both sides, and accepting fully the finding of fact of the Commissioners, I have arrived at the conclusion that, none the less, their decision cannot stand. The result is that the appeal will be allowed with costs.

J. R.

The respondents appealed. The appeal was heard on November 30, 1933.

*Raymond Needham K.C.* and *T. N. Donovan* for the appellants. By r. 5 to Cases I. and II. to Sch. D of the Income Tax Act, 1918, as amended by the Finance Act, 1926, Fourth Schedule, " the computation of tax shall be made exclusive of the annual value of lands, tenements, hereditaments and heritages occupied for the purposes of the trade or profession and separately assessed and charged under Schedule A." But it is contended that in assessing the profits or gains of the partnership the rent of 1250*l.* should, having regard to r. 3 (*c*), be deducted. The profits or gains of the partnership are computed in one sum under r. 10, sub-r. 1, and it is clear that in view of the finding that 1250*l.* was a fair and proper rent the whole of that rent would have been allowed as a proper deduction but for the fact that the premises belonged to the senior partner: see *Union Cold Storage Co.* v. *Adamson.* (1) But this is really an irrelevant consideration. Finlay J. has treated the matter as though the senior partner had merely brought additional capital into the partnership in specie, namely, the premises in Coleman Street. But it is clear from the partnership deed that the senior partner was not bringing in the premises as so much capital, but granting a tenancy of them to the partnership for the rent of 1250*l.*

[They were stopped.]

*Sir T. Inskip A.-G., J. H. Stamp* and *R. P. Hills* for the Crown. It is necessary to consider whether the payment to the senior partner in respect of the occupation of the Coleman Street premises is a disbursement of the partnership which can properly be deducted under r. 3 (*c*) and r. 5, sub-r. 1, of Rules applicable to Cases I. and II. It is to be remembered that the burden of the Sch. A tax fell on the appellants as occupiers. It is quite true that a rent paid to some outside party by a partnership for the occupation of the premises used for the purpose of the partnership business is a proper deduction, because it is an expense on the business. But here different considerations apply because the person receiving the rent is a partner. It is just as if a working partner was paid a salary. That could not be deducted as a disbursement incurred in carrying on the business, although a salary to a manager who was not a partner would be such a disbursement and could properly be deducted: compare *Ellis* v. *Joseph Ellis & Co.* (2) So, too, interest paid on capital put into the business by a partner cannot be deducted from the profits or gains: *Richardson* v. *Bank of England.* (3) The vital distinction is

(1) (1931) 16 Tax Cas. 293.

(2) [1905] 1 K. B. 324, 328.

(3) (1838) 4 My. & Cr. 165.

between an asset put into the partnership business by a partner and property let to the partnership for use in the business by a third party. Here the senior partner has put the Coleman Street premises at the service of the partnership and what he receives yearly in respect of this asset is really only interest on capital. The relation of landlord and tenant is not really created and the so-called rent is received by the senior partner in the adjustment between the partners · on account of their respective shares in the profits of the partnership. This does not affect, however, the right to deduct under r. 5, sub-r. 1, the annual value of the premises—namely, 705*l.*

[No reply was called for.]

Lord Hanworth M.R. This seems, to my mind, a very plain case. It is necessary just to state the facts, because the propositions of law are not in dispute. It, seems that one of these partners, the senior partner, acquired in March, 1926, for 10,000*l.*, leasehold premises which were subject to a ground rent of 460*l.* On September 19, 1928, a deed of partnership was entered into to regulate the business relations between the partners in respect of a business which had been carried on before, but in respect of which there had been no actual partnership deed. Under the terms of the partnership deed, these premises, of which the senior partner was the owner, were to be the place where the partners were to carry on their business, and it was provided by the partnership deed that entirely at the will and sole discretion of the senior partner and so long as he should deem fit, the partnership should use the premises and pay him in respect of the use of the premises 1250*l.* per annum as rent. There was also a provision in the partnership deed that the initial capital of the partnership should be brought in exclusively by the senior partner and that the capital should be the sum shown to his credit in the balance sheet, dated March 31, 1928, which was the date in the year up to which the balance sheet was made up, and such further sums as the senior partner from time to time in his sole discretion should deem necessary and which he should be willing to provide or which the junior partner with his consent should provide. Of course, there is nothing conclusive about this, because the Court has always to go to the substance of the matter, but so far as the balance sheet we have before us is an indication, it would seem that the capital of the senior partner was 2700*l.* and no more on March, 1931, but that he still was entitled to receive the rent of 1250*l.*, which would seem to indicate that the premises were still held by him as they had been before the partnership deed, and that nothing had intervened to make the sum of 1250*l.* per annum otherwise than payable out of the partnership assets.

There is no doubt—and the Attorney-General does not contend otherwise—that if these premises had belonged to some entirely independent owner, the partnership would have been entitled to pay that owner 1250*l.*, and that sum would have been deductible as a proper outgoing in ascertaining the profits and gains, in accordance with the indication that is given in r. 3 (*c*) of the Rules applicable to Cases I. and II. of Sch. D. On the other hand, there is no doubt that if and so far as capital had been borrowed by the firm any annual interest or other annual payment in respect of that borrowed capital paid out of the profits and gains is a deduction which definitely is forbidden in computing the annual profits and gains under r. 3 (*l*). What is said here is that although in form the sum of 1250*l.* is a payment for rent, and would be a proper payment for rent if paid to an outside person, yet as this sum is paid to a partner it is really a payment made to him in respect of capital which he brought in, in the form of premises, which may be treated as being converted into the capital sum of 10,000*l.*, so that so far as regards the sum of 1250*l.*, that was a deduction forbidden under r. 3 (*l*).

We have really therefore to decide on which side of the line this payment falls, was it a payment for rent, or was it a payment for capital? The Commissioners said this: "Having considered the evidence and arguments adduced before us, we held that 1250*l.* was a fair and proper rent for

9 Coleman Street, and was a proper and admissible deduction in computing the profits of the respondents." Before they came to that conclusion the following facts were proved before them—and they are the right persons for estimating the facts—"the rent of 1250*l.* was a fair and proper rent for 9 Coleman Street. It was in fact the rent which he"—the senior partner—"was asked to pay by the previous owners in 1926 if he decided to rent the premises instead of purchasing the leasehold interest." They therefore came to the definite conclusion that the story told in the partnership deed was a true story. I quite agree that the matter is not concluded by their finding as being a question of fact, but is open to review as a question of mixed fact and law, and that we have to construe and determine what is the result of clause 4 of the partnership deed. But I am prepared to give very considerable weight to the conclusion reached by the Commissioners, who are quite within their province in telling us that the 1250*l.* was a fair and proper rent for these premises. In those circumstances, I cannot see anything to justify our turning this habitation of the partnership into money and treating it simply as borrowed capital. It appears to me that it stands, as the Commissioners have found, as being the habitation charged at a proper rent to the partnership. Therefore, the decision of the Commissioners must be restored and the appeal allowed with costs here and below.

SLESSER L.J. I agree. The learned judge has refused to allow this rent to be deducted under r. 3 of the Rules applicable to Cases I. and II., because he says it is simply a payment made by the two partners to one of them. I think that is an over-simplification of the relations between these people as found by the Commissioners and as they appear from the deed before us. I recognize, of course, that when once it has been decided that the arrangement as to the use of the premises was a bona fide transaction, it is a question of law rather than of fact what the partnership deed means; but I share the view taken by the Commissioners that the premises were the subject of an ordinary landlord and tenant agreement in which one of the partners happened to be the landlord and the partnership the tenant. There is an obligation to pay rent and a right on the part of the landlord to determine the transaction at his discretion, and there is also an obligation on the partnership to pay for such things as repairs and the like. Such a transaction appears to me properly to be described as providing for payment of "rent" within the meaning of r. 3 (*c*). That, I think, concludes the matter. I would only add that the Attorney-General has relied in argument on difficult cases dealing with the complications which may arrive with regard to the payment of salaries and the introduction of capital into a firm. In regard to salaries, the authorities, as I understand, have decided that a partner cannot be treated as receiving a salary where money is paid to him in respect of the partnership business in one form or another. But it might well be that, if a payment were made to a partner for something altogether disconnected with the partnership business as such, he might be entitled strictly to have it treated as remuneration on an independent contract. We have not to consider that case. As regards interest upon capital, that is expressly provided for, as my Lord has said, in r. 3 (*l*). In my opinion the payment in question in this case satisfies all the requirements of r. 3 (*c*), and its deduction in computing the profits and gains is therefore proper.

ROMER L.J. I agree. I think that the answer to the argument advanced on behalf of the Crown, based on an analogy, or suggested analogy, between this case and that of services rendered by the partner to his firm, is that the services so rendered are rendered as a partner. Where two persons carry on a business in partnership, it is no more possible, in ascertaining the profits of that business or partnership for the purposes of Sch. D, to deduct the salary paid to one or both of them for the work they have done in carrying on the business than it would be for a man carrying on a business on his own account to deduct something which he thought was equivalent to the value of his services rendered to himself. But it is not true that in ascertaining the profits of a partnership no sum paid to one of the partners can ever be deducted. Suppose that two people are carrying on business in partnership as hotel proprietors, and it is necessary for the purpose of carrying on that business, that they should be supplied from time to time with wine, and suppose that one of the partners is carrying on a wholly independent business on his own account in the wine business and supplies wine to the partnership, it would, as it seems to me, be idle to suggest that for the purpose of ascertaining the profits of the hotel you could not deduct the sums paid to the partner who was the wine merchant. The fact that such a deduction would be permissible is, I think, made clear by r. 10 of the rules applicable to Cases I. and II., which says in effect that for the purposes of taxation under Sch. D a partnership is treated as a separate entity from the individual partners composing the firm. In the present case it appears to me that the premises were supplied for the use of the partnership by the partner who owned them, not in his capacity of partner at all, but in his capacity of landlord of the premises. If it were the fact that interest on capital brought in by the partners could not be deducted for the purpose of ascertaining the profits of the partnership business under Sch. D, because it was capital brought in by a partner, whereas in the case of capital advanced to the partnership by an outsider, the interest on the capital could be deducted, I should agree with the contention on the part of the Crown. But as I understand it, r. 3 (*l*) prevents the deduction of interest in both cases.

For these reasons, it appears to me that this appeal should be allowed.

*Appeal allowed.*

Solicitors: *Maxwell, Batley & Co.*; *Solicitor of Inland Revenue.*

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## GOLDEN HORSE SHOE (NEW), LIMITED *v.* THURGOOD (H.M. INSPECTOR OF TAXES).

*Revenue—Income Tax—Profits or gains of trade—Deduction—Purchase of tailings dumps—Re-treatment to extract further gold—Right to deduct from profits or gains cost of tailings from which profit derived—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I. and II., r.* 3 (*a*).

A company which was formed for the purpose acquired the right to take away and re-treat very large dumps of residual deposits resulting from the working of a gold mine and called "tailings." These tailings were known to contain a certain amount of gold, and by a new process of treatment some of this gold was recovered and sold:—

*Held* (reversing the decision of Finlay J.), that as the tailings were raw material already won and gotten, the amount expended in acquiring them was in the nature of an expenditure on the raw material of the company's trade, and therefore that for the purpose of assessing the company's profits or gains the cost of the tailings treated during the period of assessment was a proper deduction from the proceeds realized by the sale of the gold extracted.

The test laid down by Channell J. in *Alianza Co.* v. *Bell* [1904] 2 K. B. 666, 673 applied.

APPEAL from a decision of Finlay J. on a case stated by the Commissioners for the General Purposes of the Income Tax for the City of London pursuant to s. 149, sub-s. 1, of the Income Tax Act, 1918.

At meetings of the Commissioners held at Gresham College, Basinghall Street, in the City of London on February 22 and March 21, 1932, Golden Horse Shoe (New), Ld. (hereinafter called "the company"), an incorporated company having its registered office at Friars House, 39/41 New Broad Street, in the said City, appealed against assessments to income tax made upon it under the rules applicable to Case I. of Sch. D of the Income Tax Act, 1918, for the year ended April 5, 1930, in the sum of 5256*l.* less wear and tear 530*l.*

The question for the decision of the Commissioners was whether for the purposes of assessment of its profits and gains under Case I. of Sch. D of the Income Tax Act, 1918, the company was entitled to deduct any sum in respect of certain dumps of tailings its rights in which had been acquired by the company from the Golden Horse Shoe Estates Company, Ld. (hereinafter called "the old company").

The old company was formed in 1899 to acquire the undertaking and assets of the Golden Horse Shoe Mining Company, Ld., and to carry on the business of a gold mining company. For more than a quarter of a century the old company worked gold mines in Western Australia. During this time it had been a great producing company and had raised approximately 5,000,000 tons of ore. The residuals or "tailings" that remained after the abstraction of gold from the crushed ore were deposited and accumulated partly on surface lands comprised in the old company's mining leases and partly on sites of which it held "tailings leases." Several attempts were made during the lifetime of the old company to turn these tailings to profitable account by an extraction of the gold they were known to contain. It was not found possible, however, with the plant then available, to re-treat them at a remunerative cost.

In June, 1926, the old company found itself short of funds, and efforts to raise fresh capital having proved unavailing it closed down its mines. At the end of 1928 it came under the control of a group whose principal representative was Mr. F. Howard Hamilton. Mr. Hamilton, who on the assumption of control by his group became the chairman of the old company, stated in the course of his evidence that in the opinion he formed at the time the company had potentialities. He and his colleagues considered that if an amalgamation with a neighbouring company could be effected the mines might be successfully reopened. Moreover with the assistance of reports obtained from experts Mr. Hamilton and his co-directors came to the conclusion that by the installation of modern plant, with which at the time the old company was not equipped, the tailings might be profitably re-treated.

Acting upon the view that an amalgamation of its mines with those of a neighbouring company was desirable the old company entered into negotiations with Lake View & Star, Ld., and by an agreement in writing dated February 22,

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1929, and made between the old company of the one part and Lake View & Star, Ld., of the other part, after reciting that Lake View & Star, Ld., owned free from encumbrances 29 gold mining leases in the Kalgoorlie district of Western Australia, certain of which leases adjoined leases belonging to the old company, it was agreed that the old company should sell and transfer and Lake View & Star, Ld., should purchase and take over as from the completion date fixed by clause 7 thereof the gold mining and other leases at Kalgoorlie aforesaid belonging to the old company (particulars of which leases were set out in the schedule thereto) and the mining rights mills stamps dwelling-houses offices buildings ore-houses plant machinery stores stock ores and all other the undertaking property and rights of the old company in Western Australia; but there were reserved from the sale all tailings dumps upon the said property and the old company or its nominee was to have the sole right for a period of ten years from the date of the agreement to treat the said dumps for the benefit of the old company or its nominees and in connection therewith was also to retain and have for the said period free of charge certain rights therein specified including the right to sell all or any part of the said dumps either for removal from the said property or for treatment thereon. It was also provided that at the end of the said period of ten years the dumps, whether treated or untreated, should belong to and be the property of Lake View & Star, Ld.

The consideration for the sale was (in part) the allotment to the old company or its nominees of 900,000 shares of 4*s.* each in the capital of Lake View & Star, Ld.

The tailings dumps were five large conical dumps of which the tallest was 245 ft. high. The evidence showed that the tailings of which they were composed took the form of a fine powdery substance that was readily dispersed in dry and windy weather. The dumps were situated on lands comprised in mining and tailings leases granted to the old company.

In view of the reports as to their value the old company commenced construction of a reduction plant for treatment of the tailings, which were estimated to amount to over 2½ million tons. The balance-sheet of the old company at September 5, 1929, showed the cost to date of the new re-treatment plant at 11,991*l*.

The old company was wound up and the shares in Lake View & Star, Ld. (allotted to the old company as aforesaid) were distributed amongst the shareholders, and the company was formed to take over the remaining assets and to treat the tailings dumps.

The company was incorporated on September 9, 1929, and the capital of the company is 220,000*l*. divided into 1,100,000 shares of 4*s*. each.

The objects for which the company was formed as stated in the Memorandum of Association included the following :—

(*a*) to adopt, enter into, and carry into effect, with or without modification, the agreement referred to in art. 3 of Articles of Association of the company for the acquisition by the company of the undertaking property and assets of the Golden Horse Shoe Estates Company, Ld., and to complete the purchase of such undertaking property and assets, or any part thereof, and to develop, work, turn to account, or deal with the same, and to exercise any of the hereinafter mentioned powers and objects of the company, which powers and objects may be exercised independently of the primary object stated in this clause ;

(*b*) to prospect for, dredge for, open, work, explore, quarry, develop, excavate, win, purchase or otherwise obtain tin, gold, platinum, silver, copper, coal, iron, precious stones and other minerals or deposits. . . .

By an agreement in writing dated September 9, 1929, and made between the old company and Edgar Protheroe Jones the liquidator thereof of the one part and the company of the other part it was agreed that the old company and its liquidator should sell and transfer and the company should purchase and take over all the undertaking business machinery plant chattels money credits debts bills notes goodwill things in action (including the benefit of all pending contracts) shares securities and other property and effects of the old company of any nature or kind whatsoever. The consideration for the sale was the agreement by the company (1.) to pay all existing liabilities of the old company, (2.) to pay the costs and expenses of the winding up of the old company, and (3.) to allot and issue to the liquidator of the old company 1,099,993 shares of 4*s.* each in the capital of the company for distribution amongst the members of the old company share for share.

By a licence in writing dated November 25, 1930, Lake View & Star, Ld., granted and demised unto the company for a nominal rent, exclusive licence, use and authority by itself, its servants, agents and workmen either with or without horses, vehicles or tramways, to enter upon the surface of the whole of the leases mentioned in the first schedule thereto (namely, the lands upon which the tailings dumps were situated) for the purpose of removing the said tailings from off certain of the leases and that whether for the purpose of treating the same or for the purpose of depositing the said tailings which should be treated upon the said leases or any of them on gold mining leases 1085E and 1219E for a term of ten years from February 22, 1929. At the expiration of the licence all tailings, whether treated or untreated, and wheresoever deposited, were to belong to and be the absolute property of Lake View & Star, Ld.

At the date of the sale by the old company to the company the boards of the two companies were composed of the same persons, and the shareholders and officers were also the same. In January, 1932, the books and accounts of the old company were handed over to the company. The 4*s.* shares of the company were first quoted on the Stock Exchange on October 22, 1929, when the price was 1*s.* 6*d.* to 1*s.* 7½*d.* The business carried on by the company from its inception had been that of extracting gold from tailings by a re-treatment process, and selling the gold so obtained.

The profit and loss account, forming part of the audited statement of accounts covering the period from the inception of the company on September 9, 1929, to September 30, 1930, showed a debit of 122,750*l.* in respect of "tailings purchased" and a credit of 104,102*l.* in respect of "tailings stock at September 30, 1930." The manner in which the credit in respect of stock at September 30, 1930, had been computed was shown in a columnar statement.

Mr. Arthur Cutforth, a member of the firm of Deloitte, Plender, Griffiths & Co., chartered accountants, gave evidence before the Commissioners to the following effect:

He had examined the printed balance sheets of the company for the two years to September, 1930, and September, 1931, a copy of a report dated November 3, 1928, addressed by Mr. McAuley to Mr. Hamilton, and the above-mentioned columnar statement. He agreed that the figures contained in the schedule to Mr. McAuley's report purported to show the estimated potentialities of the several tailings dumps, that the columnar statement was based upon the figures in the schedule to Mr. McAuley's report, and that the columnar statement showed the total estimated value of the dumps prior to the commencement of re-treatment at a figure of 147,686*l.* On the footing that the company had purchased the dumps for 122,750*l.*, and assuming the accuracy of Mr. McAuley's estimates, and of the estimates of the costs of re-treatment, the columnar statement in his opinion correctly apportioned the purchase price among the several dumps respectively. The method adopted by the company in computing the value of the untreated tailings stock remaining on hand at September 30, 1930, for the purpose of its accounts was in his view correct. In his opinion the tailings in question were floating assets and not fixed assets, and were rightly dealt with as stock-in-trade of the company.

On behalf of the company it was contended:

(1.) that the trade carried on by the company was not a trade of mining, and that upon no true analogy could the operations of the company be compared with operations characteristic of the trade of gold mining;

(2.) that the rights acquired by the company in the tailings dumps were rights of property in a substance severed from the soil, and that at no material time did the dumps or the

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tailings of which they were composed form a part of the land on which they were deposited;

(3.) that the tailings were the raw material of the company's trade, and that for the purposes of the computation of the company's assessable profits the tailings ought to be regarded as a part of the company's stock in trade;

(4.) that in the computation of the company's assessable profits for the period from September 9, 1929, to September 30, 1930, there should be deducted from the proceeds realized by sales of bullion the cost to the company of the tailings treated during the period, and that such costs had been correctly computed in the preparation of the company's accounts for the period; and

(5.) that the assessment made upon the company ought to be reduced to the sum of 426*l.*, less an allowance of 426*l.* on account of wear and tear.

For the Inland Revenue it was contended:

(1.) that such rights as the company had in the tailings dumps were part of the undertaking which the company was formed to acquire, and that any sum paid therefor was capital expenditure;

(2.) that the tailings dumps formed part of the land on which they were deposited, but (whether technically this was so or not) the purchaser of the rights in the tailings dumps was the purchaser of a wasting asset which formed part of the capital of the company;

(3.) that any sum paid by the company for the acquisition of its rights in the tailings dumps was capital expenditure and was not a proper deduction in arriving at the company's profits and gains under Case I. of Sch. D of the Income Tax Act, 1918.

The Commissioners found that the sum of 122,750*l.*, the purchase price of the tailings, was not deductible for the purposes of income tax.

Finlay J. said that the point in the case was whether the sum paid for the tailings was capital expenditure and therefore not deductible from the profits or gains of the company for income tax purposes, or whether it was expenditure in the nature of income expenditure and therefore deductible. Was it like money used to acquire a mine which was to be worked, in which case it was clear that it would not be deductible; or was it like money which a draper expended in order to stock his shop, in which case it would be clear that it would be deductible?

He thought here that the Commissioners had stated the facts and then arrived at a conclusion upon those facts, and that the conclusion was really a question of law, namely, whether, applying the correct principles of law to the facts as found, the deduction was one which could or could not be made. The chief authorities on the point were *Coltness Iron Co.* v. *Black* (1), *Alianza Co.* v. *Bell* (2) and *City of London Contract Corporation* v. *Styles.* (3) Giving weight to the authorities and to the conclusion arrived at by the Commissioners, he had formed the view, though not without hesitation, that the Commissioners were right. He thought that what was being done in this case was like the working of a particular mine or bed of thick earth, and converting the material worked into a marketable commodity. What the company really did was to acquire these enormous dumps in order to work them and convert the stuff extracted into a marketable commodity, namely gold. He had come then to the conclusion that this was analogous rather to acquiring a right to mine than to the purchase in bulk of a stock-in-trade.

The company appealed. The appeal was heard on December 5, 6 and 7, 1933.

*Sir W. Jowitt K.C.* and *F. Heyworth Talbot* for the appellant company.

*Sir Donald Somervell S.-G.* and *R. P. Hills* for the Crown.

*Cur. adv. vult.*

1933. Dec. 15. LORD HANWORTH M.R. This appeal raises once more the difficult question as to what expenditure may be deducted from the profit and loss account in

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(1) [1881] 6 App. Cas. 315. (2) [1904] 2 K. B. 666; [1905] 1 K. B. 184.
(3) (1887) 2 Tax Cas. 239.

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order to compute the amount of the profits and gains to be charged with income tax.

The facts are important. The Golden Horse Shoe Estates Co., Ld., was formed in 1899 to acquire the undertaking and assets of the Golden Horse Shoe Mining Co., Ld., and to carry on the business of a gold mining company. For more than 25 years this company worked gold mines in Western Australia. During this period it had been a great producing company, and had raised five million tons of ore.

The residuals, or tailings, that remained after the extraction of gold from the crushed ore were deposited, and accumulated, partly on surface lands comprised in the company's mining leases, and partly on sites of which it held "tailings leases."

In spite of attempts made by the company to turn these tailings to profitable account by an extraction of the gold they were known to contain, it was not found possible with the plant then available to re-treat them at a remunerative cost.

In February, 1929, the company assigned—to put it shortly—all its gold mining leases, mills, stamps, dwelling-houses, offices, stocks, etc., and "all other the undertaking, property and rights of the company in Western Australia," to a company called the Lake View & Star, Ld.; but there were reserved from this assignment all tailings dumps upon the property of the company, which was to retain the sole right for a period of ten years from the date of assignment to treat the said dumps for the benefit of the company, or its nominee; and in connection therewith, it was to retain and have for these ten years, free of charge, certain rights therein specified, including the right to sell all or any part of the said dumps either for removal from the said property or for treatment thereon. The tailings dumps were so excepted because it was thought that with new plant a profit could be made out of their re-treatment.

These dumps are five in number and the tallest is 245 ft. high. They are composed of a fine powdery substance which is blown about in dry and windy weather, and it is estimated that they contain some 2½ million tons in bulk. The company had prepared a new plant for the re-treatment of the dumps at a cost of 11,991*l.*

The appellant company, the Golden Horse Shoe (New) Co., was incorporated on September 9, 1929, for the purpose of taking over, and it did take over, the tailings dumps, machinery, plant and assets which had been excepted from the assignment to the Lake View & Star Co. as already stated, including the benefit of all pending contracts, and for the purpose of working and re-treating the tailings dumps so as to recover the gold therefrom, during the balance of the term of ten years.

The capital of the new company was 220,000*l.* divided into 1,100,000 shares of 4*s.* each. An account "K" before us, showed the allocation of the purchase consideration for the property assigned to the appellant company, in which the consideration for the tailings dumps was placed at 122,750*l.*; sundry plant at 12,129*l.* 15*s.* 7*d.*; debtors 60,710*l.* and cash 32,574*l.* The Commissioners accepted these figures as correct.

The appellant company started work, and the business carried on by it from its inception has been that of extracting gold from these tailings dumps by a re-treatment process and selling the gold so obtained.

The company appealed against an assessment to income tax under Sch. D, Case 1, made upon it for the year ended April 5, 1930, in the sum of 5256*l.*, less an allowance for wear and tear of 530*l.* They contend that their business was not mining for gold, but only treating the dumps known to contain gold so as to recover it, that the tailings were the raw material of the company's trade, and that for the purpose of the computation of their assessable profits the tailings ought to be regarded as part of the company's stock in trade, and the cost of so much of it as was consumed in obtaining the profits and gains ought to be deducted in their computation—in other words, that there should be deducted from the profits realized by the sales of bullion the cost to the company of the tailings treated during the same period.

The contention of the Inland Revenue was that the tailings were part of the undertaking which the company was formed to acquire, and that any sum paid therefor was capital expenditure—that the tailings dumps were a wasting asset which formed part of the capital of the company and could not be taken into account any more than the caliche of the nitrate fields could be allowed for in the case of *Alianza Co.* v. *Bell.* (1)

The Commissioners disallowed the company's claim, and upon an appeal to the High Court Finlay J. confirmed the decision of the Commissioners. Hence the company now appeal to this Court.

The question involved is always a troublesome one, and is not rendered less difficult by recalling the principle which has many times been approved in the Courts, that prudent directors of a company would make provision for the wasting character of their enterprise: see per Lord Cairns in *Coltness Iron Co.* v. *Black* (2) and per Channell J. in the *Alianza* case (3), and Lord Collins M.R. in the same case. (4)

Yet that principle is not, except to a limited, though in recent years, to an increasing extent, recognized in the method of the computation of profits and gains to the income tax.

The attempt was made to give authority to a rule that a deduction for exhausted capital ought to be made in the calculation of the "full amount of the balance of profit or gains," in the case of *Knowles & Sons, Ld.* v. *McAdam* (5), but that case was overruled in *Coltness Iron Co.* v. *Black.* (2)

In the latter case it was held that the tenant of minerals was not entitled to deduct from the gross profits a sum representing the amount of capital expended in making bores and sinking shafts which had been exhausted by the year's working. The decision in *Alianza Co.* v. *Bell* (1) is to the same effect; the wasting asset there being the caliche in Chili, from which nitrates and iodine are extracted, and which is measurable in quantum, and estimable in duration, from the outset of the working.

The same rule has been applied to cases other than dealings with mines or minerals, or standing timber: *Kauri Timber Co.*

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(1) [1904] 2 K. B. 666; [1905] 1 K. B. 184.

(2) 6 App. Cas. 315, 324.

(3) [1904] 2 K. B. 674.

(4) [1905] 1 K. B. 193.

(5) (1877) 3 Ex. D. 23.

v. *Commissioner of Taxes.* (1) Thus in *City of London Contract Corporation* v. *Styles* (2) a company took over a business and the unexecuted contracts in relation to it, which they proceeded to carry out, and under which they were able to earn a profit in the course of their execution ; and again in the case of *John Smith & Son* v. *Moore* (3), where some forward contracts for coal were acquired by a newcomer in a business of selling coal, and it was held that the money laid out in the purchase of these contracts was not laid out in the purchase of the stock—that is coal—the staple article of the business, but as fixed capital for the purpose of enabling the trader in coals to acquire a source from which he could fill the contracts of the business carried on. This case is, however, interesting as illustrating the divergence of legal opinion that arises upon the problem in the present case and the difficulty of finding any exact test by which to solve it.

I have in successive judgments in *Atherton* v. *British Insulated and Helsby Cables, Ld.* (4) ; in *Mallett* v. *Staveley Coal and Iron Co.* (5) ; in *Morley* v. *Lawford & Co.* (6) ; and in *Anglo-Persian Oil Co.* v. *Dale* (7) said much—perhaps as much as I can find it useful to say—upon the subject, and in cases which afford illustrations on both sides of the line. In *Mallett's* case (5) the outlay upon the surrender of the coal seams to the lessor was held to be an expenditure of capital. In *Lawford & Co.'s* case (6) a payment of a guarantee given in the course, and for the purpose, of the business was held to be a permissible deduction. In the *Anglo-Persian* case (7) it was held that money paid to cancel an agreement of agency was a deduction proper to the carrying on of the business.

In *British Insulated and Helsby Cables, Ld.* v. *Atherton* (8), in the House of Lords, there was a divergence of opinion among the noble Lords—three to two. The majority held, affirming the Court of Appeal (4), that a payment to a pension fund, to make it actuarially sound for all the existing staff, was

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(1) [1913] A. C. 771.
(2) 2 Tax Cas. 239.
(3) [1921] 2 A. C. 13.
(4) [1925] 1 K. B. 421.
(5) (1928) 13 Tax Cas. 772.
(6) (1928) 14 Tax Cas. 229.
(7) (1931) 16 Tax Cas. 253.
(8) [1926] A. C. 205.

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a capital expenditure and not to be deducted in the computation of profits and gains.

The above cases serve to establish the difficulty of the question rather than to affirm any principle to be applied in all cases. Indeed, in the last case cited, Lord Cave says that a payment once and for all, a test which had been suggested by Lord Dunedin in *Vallambrosa Rubber Co.* v. *Farmer* (1), was not true in all cases, and he found authority for that statement in *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (2), and the *Anglo-Persian* case (3), already referred to, is another.

The test of circulating as contrasted with fixed capital is as good a test in most cases to my mind as can be found; but that involves the question of fact: was the outlay in the particular case from fixed or circulating capital?

It is clear that there may be an immediate outlay for the purpose of the trade carried on, a large outlay on the stock in trade which is to be marketed over such a span of time as the business warrants. An illustration of such an outlay is to be found in the *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (4) and in *Martin* v. *Lowry* (5), where the purchase was under a single contract and a large trading organization was thereafter set up to deal with the goods so purchased.

After careful consideration of the present case, in the course of which my mind has fluctuated on either side, I think it is to be decided upon its own facts—that none of the tests suggested afford a strict rule of guidance. It seems then that the company bought these dumps—which were no longer in a natural but in an artificial condition: which were in such a state that they would not have passed under a lease of "beds opened, or unopened, or minerals": see *Boileau* v. *Heath* (6)—for the purpose of treating them as their stock in trade, lying stored and ready to their hand, at a fair price of 122,750*l.*, and their intention was to use them up and make what they could of them by and after treatment. They had not to win them from the soil; they had been gotten already.

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(1) (1910) 5 Tax Cas. 529.
(2) [1914] 3 K. B. 674.
(3) 16 Tax Cas. 253.
(4) [1921] 1 K. B. 64.
(5) [1926] 1 K. B. 550.
(6) [1898] 2 Ch. 301.

If the metaphor of working a mine be applied, it might be said that the purchase of the dumps was a capital outlay. If the metaphor of making gas, or coke, from coal, or of a miller making flour from wheat, be applied, it may be said that it was an outlay to be placed in the profit and loss account. But metaphors do not provide exact definitions and are often misleading. It is safer to give an interpretation to the facts of this case as found in the case stated, and upon the law relevant to them.

The Commissioners have not reached their decision upon a finding of fact. Their phrase is uncertain in its meaning, whether they intended to express a finding of fact or a conclusion according to their interpretation of the law.

Under r. 3 (*a*) of the Rules applicable to Cases I. and II. of Sch. D, a deduction is allowed in computing the amount of the profits and gains, if it is " money wholly and exclusively laid out or expended for the purposes of the trade." Is it not true that the expenditure upon the tailings dumps was for the purpose of the trade of re-treating them and no other? I know of no better exposition of the tests to be applied to facts such as are found here, than those propounded by Channell J. in his decision in the *Alianza* case. (1) He says: " The Legislature might if it chose say that the gross receipts of a business should be treated as profits for the purpose of income tax without any allowance for current expenses, and, if it did say so, the rule would have to be followed. But it has not gone quite so far as that. I find nothing in the rules to say that if the business to be assessed is that of manufacturing an article and selling it, and nothing more, the cost price of the material consumed in the manufacture is not to be taken into account in assessing the profits. In the ordinary case, the cost of the material worked up in a manufactory is not a capital expenditure; it is a current expenditure, and does not become a capital expenditure merely because the material is provided

(1) [1904] 2 K. B. 673

by something like a forward contract, under which a person for the payment of a lump sum down secures a supply of the raw material for a period extending over several years. I do not think it would be necessary that the payment for the raw material should be in the year of assessment, or even in the three years over which the average extends. It is not necessary to deal with that point at present, and I do not decide it; I merely say that I do not think it would be necessary. The question in this case which we have to consider is what is the nature of the adventure or concern which this particular company is carrying on. If it is merely a manufacturing business, then the procuring of the raw material would not be a capital expenditure. But if it is like the working of a particular mine or bed of brick earth, and converting the stuff worked into a marketable commodity, then the money paid for the prime cost of the stuff so dealt with is just as much capital as the money sunk in machinery or buildings. In my opinion the particular adventure here belongs to the latter category. This company must be treated as a company formed for the purpose of working and developing the bed of caliche."

Upon the facts before him he came to the conclusion that the adventure of winning and working the bed of caliche was an outlay of capital. The present facts seem to point to a manufacturing business applied to raw material already won and gotten. On this view, and for these reasons, the appeal must be allowed with costs here and below, and the case remitted for the assessment to be adjusted accordingly. I would desire to add, as we are differing from Finlay J., that he expressed his decision with considerable doubt; and the case is one of a class that, as already mentioned, affords a variety of legal opinion.

Romer L.J. The question to be decided in this case is whether the dumps are to be regarded as fixed capital or as circulating capital. If they are the former, it is conceded by the appellants that the assessment made on them is correct. If, on the other hand, they are floating or circulating capital, it is conceded that the cost of them to the appellants must be debited in the profit and loss account, the account being credited with the cost price of what was left of the dumps at the end of the year of assessment. The dumps, in other words, must be dealt with in the profit and loss account as stock in hand has to be dealt with in the profit and loss account of any other trader. The reason for this distinction being drawn between fixed and floating or circulating capital is not far to seek. In assessing a trader to income tax under Sch. D, Case I., the revenue authorities are only concerned with his annual gains and profits; that is, gains and profits in the year of assessment or whatever may be the other material interval of time. They are not in the least concerned with his financial position as a whole at the end of the time as compared with his financial position at the beginning. Changes in the value of his fixed capital are therefore disregarded except where it is otherwise expressly provided in the Act. On the other hand, changes in his floating or circulating capital must be taken into consideration in ascertaining his annual gains and profits. For the profits or losses in a year of trading cannot be ascertained unless a comparison be made of the circulating capital as it existed at the beginning of the year with the circulating capital as it exists at the end of the year. It is, indeed, by causing the floating capital to change in value that a loss or profit is made.

Unfortunately, however, it is not always easy to determine whether a particular asset belongs to the one category or the other. It depends in no way upon what may be the nature of the asset in fact or in law. Land may in certain circumstances be circulating capital. A chattel or a chose in action may be fixed capital. The determining factor must be the nature of the trade in which the asset is employed. The land upon which a manufacturer carries on his business is part of his fixed capital. The land with which a dealer in real estate carries on his business is part of his circulating capital. The machinery with which a manufacturer makes the articles that he sells is part of his fixed capital. The machinery that a dealer in machinery buys and sells is part of his circulating capital, as is the coal that a coal merchant buys and sells in the course of his trade. So, too, is the coal that a manufacturer of gas buys and from which he extracts his gas. For the purpose of ascertaining his profit in a year it is clear that he must debit his profit and loss account with the purchase price of the coal that he treats in the course of that year, and that, too, whether he buys it in that year or buys it in advance. It is part of the cost of producing the gas that he sells. Such cases as these cause no difficulty. But now suppose that the gas manufacturer, instead of buying his coal from outside sources, purchases a coal mine and produces the coal that he requires by mining. The cost of extracting from the mine the coal treated will, of course, be a permissible deduction in ascertaining the profits of his business in the year. But he may not debit his profit and loss account with the sum by which the value of his mine has depreciated in consequence of the extraction of that coal. For the mine is regarded as being fixed capital: see *Coltness Iron Co.* v. *Black* (1) and *Alianza Co.* v. *Bell.* (2) If, on the other hand, instead of buying the mine, the gas manufacturer had bought a quantity of coal already extracted from the mine and stacked on the surface, the price of the coal would have been regarded as part of the circulating capital. The reason for this distinction is not at first sight very easy to discover. It must, as it seems to me, be found in this: that in the former case the purchase of the mine is not a purchase of coal but a purchase of land with the right of extracting coal from it. The land is regarded merely as one of the means provided by the manufacturer for causing coal to be brought to his gas works, and therefore as much part of his fixed capital as would be any railway trucks or lorries provided by him for the same purpose. The land is regarded as a capital asset of the same nature as the coal contracts that were held to be fixed capital in *John Smith & Son* v. *Moore.* (3) In that case Lord Sumner said (4): "The business carried on was not that of buying and selling contracts, but of buying and selling coals, and the contracts, which enabled the seller of the coals to acquire the coals, were no more the subject of his trading as a stock in trade for sale than a lease of a brickfield would be the subject of a sale of bricks."

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(1) 6 App. Cas. 315; 1 Tax Cas. 287.

(2) [1904] 2 K. B. 666; [1905] 1 K. B. 184.

(3) [1921] 2 A. C. 13.

(4) Ibid. 38.

It seems to follow from these considerations that the question to be decided in the present case resolves itself into this: Are the dumps the raw material of the appellants' business or do they merely provide the means of obtaining that raw material? In my opinion they are the raw material itself. It was contended on the part of the Crown that the raw material of the appellants' business is gold. But this is not so. Gold is the finished product of their business, just as much as gas is the finished product of the gas manufacturer's business. The raw material in the one case is the tailings of which the dumps are composed, and the raw material in the other is the coal. If, instead of buying the whole dump at one time, the appellants had purchased and treated with the process so many tons of tailings a month, I do not see how it could be contended that the cost of purchase was not an expense that could be deducted for the purpose of ascertaining the profit made by them by the sale of the resultant gold. The fact that they bought the whole stock of the material at once cannot make any difference. If in the one case the material used in a year represents circulating capital, so it does in the other case. "In the ordinary case," says Channell J. in *Alianza Co.* v. *Bell* (1), "the cost of the material worked up in a manufactory is not a capital expenditure"; (by which, of course, he meant is not a fixed capital expenditure) "it is a current expenditure, and does not become a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of a lump sum down secures a supply of the raw material for a period extending over several years." In the present case the appellants by payment of a lump sum down secured a supply of their raw material for several years. None the less the sum so paid is part of their circulating capital and cannot be disregarded

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(1) [1904] 2 K. B. 673.

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in ascertaining their yearly gains and profits earned by its use. The sum so expended has been found by the Commissioners to be 122,750*l.*, and that finding is binding upon the parties to this appeal and upon us.

For these reasons I am of opinion that the appeal should be allowed with costs.

LORD HANWORTH M.R. Slesser L.J. desires me to say that he has read both of these judgments and agrees with them both.

*Appeal allowed.*

Solicitors: *Birkbeck, Julius, Edwards & Co.; Solicitor of Inland Revenue.*

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## MARKLAND *v.* MANCHESTER CORPORATION.

[1933. M. 2269.]

*Negligence—Water Authority—Bursting of pipe in roadway—Damage—Liability of Authority.*

Manchester Corporation were the statutory authority for the supply of water to, among other places outside the City limits, the borough of Eccles. In February, 1933, one of the Corporation's service pipes in a road in Eccles burst and caused a pool of water to form on the road. The water lay for three days, and on the third day on frost supervening it froze, and on the ice so formed a motor car skidded and knocked down and killed a man. The Corporation were not informed till after this accident of the fact that there had been a burst. In an action, under the Fatal Accidents Act, 1846, by the widow of the deceased man against the owner of the car and the Corporation, the judge exonerated the owner of the car from blame but held the Corporation liable in damages as having been negligent in not having taken prompt steps to attend to the leak and so prevent the road being dangerous for traffic.

On appeal by the Corporation:—

*Held* (Scrutton L.J. dissenting), that although the precautions taken by the Corporation as to testing their pipes for leaks and their practice of relying for notification of leaks by the servants of various local authorities were those usually adopted by water authorities, the Corporation were not entitled to rely on precarious and unco-ordinated methods of receiving information as to leaks from the servants of the

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local authorities, and as on the evidence they had themselves failed to take all reasonable steps to obtain timely knowledge of the existence of the leak and consequent flooding of the road, they were liable in damages.

Decision of Macnaghten J. affirmed.

APPEAL from a decision of Macnaghten J. in an action tried by him at Manchester.

The plaintiff, as the widow of Tom Markland, sued under the Fatal Accidents Act, 1846, claiming damages from Manchester Corporation and William Bamford in respect of the death on February 11, 1933, of her husband, who was knocked down, and so seriously injured that he died the same day, by a motor car driven by Bamford which skidded on some ice on a road in the borough of Eccles, the accident being due, as she alleged, to the joint negligence of the Corporation and Bamford, or the separate negligence of one of them.

The circumstances which led to the ice covering the roadway at the place in question, which as a highway was under the jurisdiction of the Eccles Corporation, were shortly as follows: The defendant Corporation were the undertakers for the supply of water to the houses fronting the main road where the accident happened. They had, pursuant to their statutory powers, laid two water mains in that road, from which mains the houses in the road were supplied with water by means of communication pipes. In 1906 the Corporation laid a single service pipe for the supply of water to two houses, Nos. 453 and 455 Worsley Road, and in consequence of a burst in that pipe the escaping water was forced up into the roadway, which at that place was covered with stone sets, on Thursday, February 9, 1933, and water ran down into the gutter, this state of things continuing all Thursday, Friday and Saturday. On Saturday evening there was a severe frost, and the roadway being then well covered with water from the burst pipe became coated with ice, on which Bamford's car skidded and caused the accident. So far as the claim against Bamford was concerned, the judge found that there was no want of care on his part, and the action against him accordingly failed. So far as the action against the Corporation was concerned, the judge held that there was no negligence on their part either as to the character of the pipe which burst—it had been laid for twenty-seven years and the usual length of life of such a pipe was eighty years—or as to the manner in which it had been laid: *Green* v. *Chelsea Waterworks Co.* (1), referred to with approval by Lord Sumner in *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (2) With regard to the detection of leaks, it appeared that a waterman in the service of the Corporation visited each street in his district every nine days, listening at each stopcock; that the waterman had on the day before the burst occurred listened at the stopcock in the road in question and heard nothing to indicate a burst. It further appeared that the Corporation relied on being notified by servants of the various local authorities—the highway authority, the police, and the tramway men; but there was no specific arrangement with these various authorities with regard to the prompt notification of leaks by their servants. In fact, the Corporation were not informed of the leak in question till after the accident had occurred. There was evidence that in Bolton the measures for detecting and notifying leaks were practically the same as those in the areas supplied with water by the defendant Corporation.

Macnaghten J. held that it was incumbent on the Corporation to take all reasonable steps which could be practically taken to inform themselves of a burst pipe; and that in view of the fact that the burst in question occurred in a main road on which there was a great deal of traffic by night as well as by day, and in view of the further fact that for three days no knowledge of the burst reached the Corporation officials, the Corporation had failed to discharge the duty which rested upon them of dealing promptly with the burst, and he accordingly gave judgment for the plaintiff.

The Corporation appealed.

*Stuart Bevan K.C.*, *Eastham K.C.*, and *Harold Rhodes* for the appellants. No evidence of negligence on the part of the appellants has been brought home to them. Here it is

(1) (1894) 70 L. T. 547.

(2) [1914] 3 K. B. 772, 781.

important to keep in mind that the road where the burst occurred was within the jurisdiction of the Eccles Corporation who, as the highway authority, were as much interested in the matter as the appellants. The duty of the Eccles authority to deal with leaks at the earliest possible moment has to be remembered as a factor decreasing enormously the chance of an escape of water in the road being left undetected for any length of time. The appellants were entitled to rely on notification by the officials of Eccles Corporation; they were also entitled to rely on notification by the police and by the tramway authorities, all being interested in the maintenance of the road in a safe condition as much as the appellants were. Our duty, no doubt, is to prevent, if we can, the occurrence of accidents due to the escape of water, but if we exercise, as we did, the same care as that habitually exercised by other water authorities in similar circumstances we have discharged our duty. The system of testing may not be infallible, but it has worked with reasonable satisfaction just as it has worked in other water-supply areas. The fact that a pipe bursts is quite consistent with the exercise of the utmost care by the appellants.

[TALBOT J. referred to *Manchester Corporation* v. *Farnworth.* (1)]

There the onus was on the Corporation, and there too the plaintiff, who was complaining of a nuisance created by the Corporation, had pointed out certain remedies which would have prevented the nuisance, and which had not been adopted. Here the onus is on the plaintiff to establish negligence on the part of the appellants, and she has failed to do so.

[Salmond on Torts, 7th ed., pp. 27 et seq., was referred to.]

*Gorman K.C.* and *Jessel Rycroft* for the respondent. The fact that the burst in question continued undetected for nearly three days shows that the system of notification on which the appellants were content to rely had broken down, and for that failure they must be held responsible. There should have been definite instructions in writing to the highway and other authorities as to the prompt notification of leakages, and there were none. Moreover, especially at the time of year

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(1) [1930] A. C. 171.

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when the accident occurred, the appellants should have ordered inspection, particularly of main roads on which there is heavy traffic, by their own watermen much oftener than every nine days. The judge was therefore right in holding the appellants liable.

*Stuart Bevan K.C.* replied.

*Cur. adv. vult.*

1934. Jan. 29. The following judgments were read :—

SCRUTTON L.J. About 11 o'clock in the evening of Saturday, February 11, 1933, a man was killed by a motor car in collision with a tramcar on a road in Eccles near Manchester. The motor car had skidded on ice in the road, a frost having set in about 8 o'clock that evening, following some mild wet weather. The frozen water in the road came from a burst lead service pipe through which the Manchester Corporation, who, though the house and the burst service pipe were not in the City of Manchester, were the statutory authority supplying that district with water. The road authority at the place in question were the Corporation of Eccles. The road was policed by the Lancashire County Constabulary. The tramcar was run by the Salford Corporation. An action was brought by the widow of the deceased man against the owner of the motor car and against the Manchester Corporation. The case was tried before Macnaghten J. who freed the owner of the motor car from liability, but gave judgment against the Manchester Corporation, who now appeal.

The negligence alleged against the Corporation was, first, that they caused the water main to flood the roadway in such a manner as to make it dangerous. This was meant to allege negligence in the construction or management of the service pipe, but the judge acquitted the Corporation of any such negligence and, therefore, under the authority of the decision of the Court of Appeal in *Green* v. *Chelsea Waterworks Co.* (1), held the Corporation not liable on this head of claim, and this decision is not appealed against. But secondly, the plaintiff alleged that the Corporation before the accident knew or ought to

(1) 70 L. T. 547.

have known of the leak in the service pipe and the consequent flooding, and failed to take any sufficient steps to provide for the safety of persons using the roadway in case of frost. As to this allegation, the judge found that the Corporation did not know of the burst and flooding before the accident, but that they ought to have known, that is, were negligent in not knowing, with the consequence that they negligently took no steps to render the roadway safe for persons using it.

The hole in the lead service pipe was probably caused by what is called " fatigue " in the pipe, a condition resulting from continuous vibration and change of stresses in the metal. This " fatigue " in some metals has been known of in steel for at least forty years. I was counsel in a case between 1890 and 1900 where its existence in steel was alleged and investigated by the leading experts from Sheffield. It has, apparently, only recently been realized that " fatigue " may affect lead water pipes, and a Scientific Research Association is now investigating the question. The average length of life of a lead water pipe underground is eighty years ; the pipe which burst had been in the ground for under thirty years.

There was a conflict of evidence as to when water first made its appearance in the road. A witness for the plaintiff put it early on Thursday morning, February 9. If so, as the water came up some distance from the actual burst and had to get round a bed of concrete, the burst had probably happened a little time before this. A Corporation water inspector had " listened " with a stethoscope at the hydrant on the Wednesday morning, the 8th, about 11 o'clock. This was done in the ordinary course of his duty, which was to go to all hydrants in his district, an operation which took about nine days. This process would certainly have detected any leakage in a main, and would probably have detected any leakage in a service pipe. At any rate, it was the usual precaution relied on by all water authorities. The waterman had heard nothing on Wednesday to cause him to suspect a leak on the Wednesday, and no water was seen in the road on the Wednesday. Three people said they saw water in the road on the Thursday, water oozing up from a place where there was settlement of the granite setts in a small area. From that place there was a slight slope down, at the bottom of which was a grid to drain off water. Thursday and Friday were rainy and mild days. On the other hand, one of the policemen on duty at the place of the burst passed on the footpath by the burst on the afternoon of Thursday, February 9, and "did not see any water flowing along." If he had seen it he said it was his duty to report it to the Eccles fire station. He also passed along the road on the night of Friday, February 10, and did not see any water. Buckley, the road superintendent of the Eccles Corporation, rode his bicycle along the road twice during the daytime of Friday, February 10, on the side of the road where the burst was, and there was, he says, no sign of water on the road. He had instructions from his Borough Surveyor to report any bursts either to the Eccles Town Hall or the Manchester Water Mains Department. The judge finds as to these two witnesses that they did not see any water, but that they ought to have seen it; he apparently holds the Manchester Corporation liable for the omission or failure by these two witnesses, though they are not servants of that Corporation.

Tramcars ran regularly along the road, and Bellingham, the conductor at the time of the accident, gave a variety of stories. He said at the inquest that he noticed the water burst on the night before the accident—namely, Friday. "It was just oozing, just started," and repeated at the trial that he saw it on the Friday. He said later that he saw it on the Thursday. He said that he reported water bursts; it was his duty to do so; he did not report this burst "because it had already been reported." Neither counsel followed this up to find out what previous report had been made, when and by or to what person. Lastly, none of the residents who deposed to water present on the Thursday or Friday reported it to anybody. The judge has found that water from the burst was present from the Thursday morning till the time of the accident, and I am not able to dissent from his finding. It may be that one explanation of the discrepancy is that the amount of water present has been exaggerated, and it did not become dangerous to persons using the road till 8 P.M. on the Saturday when the frost began.

Counsel agreed that it was the duty of the Corporation to take reasonable precautions to discover leaks and to repair them. There is no doubt that when the Corporation discovered this leak, they repaired it in reasonable time. The short question, therefore, is: were they negligent in not discovering it before, which involves the question what precautions or measures they could and should have taken to discover it earlier. It is no good saying a man is negligent unless you can say what he ought or ought not to have done.

The district over which the Manchester Corporation supplies water is 130 square miles in extent; they have in it 1250 miles of main and 200 miles of lead service pipes to houses. They have an average of 2000 bursts a year, an average of fifty bursts a week. The neighbouring Corporation of Bolton has a similar number of bursts. The Corporation workmen are travelling about the area all the week repairing bursts, which have been seen and reported to them, and in that way see a good deal of the roads. But they have other sources of information. In the City of Manchester itself other Departments have opportunities of seeing and reporting to the Water Department—the Sanitary Department, with travelling dust carts, the Road Department and others. Outside the City, at the scene of this accident in Eccles, there is the Road Department of the Eccles Corporation, which is as much interested in the condition of the roads as the Water Authority. Their Borough Surveyor, Mr. Elce, gave evidence that all the Eccles Corporation officers had instructions to report water bursts to his office and to the Manchester Water Department. The County Police had instructions to report water bursts. The tramway men had similar instructions. A list of the water inspectors was contained in every rate demand paper.

What the Corporation did was what, according to the evidence, every other water authority did. They listened with a stethoscope at every hydrant in a periodical round, which in this district took nine days, and the waterman had so listened on Wednesday at 11 A.M. and heard nothing. The uncontradicted evidence was that this operation should disclose a leak in a service pipe. They also had their repair workmen going about the district every day to mend the average of fifty bursts a week. There were also a series of authorities on the road, whose servants were constantly passing the scene of the burst and had instructions from their own superiors to report bursts. The police patrolled the road every day and had instructions to report bursts. The road authority had a large number of men constantly on the road doing repairs, and a high road official actually passed the burst on this road twice on the Friday: the Salford tramways drivers and conductors were constantly up and down the road and were in the habit of reporting. The local residents might be expected to report. The Corporation undoubtedly relied on these probable sources of knowledge of bursts.

Apart from the other authorities, I ask myself what ought the Corporation to have done? They have 1500 miles of mains and service pipes in a district 130 square miles in extent. Are they to have a man in each road every day, once or twice? I asked counsel for the plaintiff what his contention was if the sources of information from other authorities were to be disregarded, and he said a man in each road every other day, especially in winter, and in main roads. The danger in winter depends upon frost, which fortunately is not continuous in Manchester, and in main roads there is more likelihood of other authorities reporting bursts in their own interests. If you add to this two days inspection, the extreme probability of other interested authorities, whose servants are constantly on the spot, giving information, the question to be decided is: Is a water authority, who takes itself the precautions usually taken by other water authorities, and adds to them the probability of information from other interested authorities, guilty of negligence if it is not informed of a water burst for two and three quarter days? This is not a question of credibility of witnesses, but of inferences to be drawn from admitted facts.

I have carefully considered the evidence and arguments and have come to the conclusion that I am not entitled to find the Corporation negligent because they did not become aware of this burst for two and three quarter days from the time when someone first saw it. For nearly the whole of that time, until the frost set in at 8 p.m. on Saturday, the burst was not dangerous to users of the road, though if continued it would damage the road, and if frost set in it might be dangerous to persons using the road. Even assuming, as the judge finds, that some servants of an independent authority, who ought to have reported bursts, through negligence—failure to use their eyes—did not see the burst and therefore did not report it, I do not see how their negligence can be imputed to the Corporation. It is a failure of their precautions, their sources of warning, but not a failure due to negligence on their part.

In my opinion, the appeal should be allowed and judgment entered for the defendant Corporation with costs here and below.

SLESSER L.J. In this case the plaintiff sues the Manchester Corporation for damages for negligence under the Fatal Accidents Act, 1846, which negligence she averred caused the death of her husband. The material facts in the case are unusual; they are as follows: On Saturday, February 11, 1933, a Mr. Bamford, who was a co-defendant of the Manchester Corporation, but who succeeded before the learned judge, was driving a motor car at night when his car skidded into the rear of a tramcar, from which the deceased man was descending, and killed him. At the time, Mr. Bamford, the judge finds, was driving properly and reduced his speed when he saw that the tramcar was about to stop to set down passengers, but his wheel came into contact with a sheet of ice which caused the car to become unmanageable. It is clear on the findings of the learned judge that the presence of this sheet of ice, whoever was responsible for it, was the cause of the accident; and the case resolves itself, on this appeal, into an inquiry whether the ice, which had admittedly been produced through the road having been flooded from a leak in the defendants' water pipe, was ice for the presence of which the defendants were responsible in negligence.

The particulars of negligence in the statement of claim which the judge holds to have been established were as follows: That the defendant Corporation "knew or ought to have known that the said water main was leaking and causing water to run over the surface of the roadway and knew and ought to have known that in view of the coldness of the weather the said water was likely to freeze and cause a sheet of ice to form in the said roadway to the danger of traffic proceeding thereon and failed to take any or any reasonably sufficient steps to prevent this happening and/or to warn traffic using the said roadway of the said danger or otherwise to provide for the safety of persons lawfully using the said roadway."

The appellants contend that, on the facts of the case properly considered, the learned judge was wrong in holding that the accident by which Mr. Markland was killed was brought about by the negligence of the defendants in allowing this leakage to continue for so long a period, and at a time when, owing to the frost on the Saturday night, the water froze, which resulted in the car, belonging to Mr. Bamford, skidding in the manner which caused Mr. Markland's death.

Although there is some dispute on the evidence how long the water had lain upon the surface of the roadway, the judge has found as a fact that the water was present upon the road two days before the accident; that is to say, on the Thursday, Friday and Saturday. There is ample evidence on which the learned judge was justified in coming to this conclusion. A Mrs. Parker, who lived close by the accident, stated that she left her house at 5.50 on the morning of Thursday, February 9, and that she then noticed a very bad pool of water opposite the house and that it was then oozing up. It was getting very much worse, she said, on the Friday and on the Saturday she had to give an extra stride to cross it to where she was going.

A Mr. Beaumont first speaks to noticing the water on the road on Thursday after dinner, that is at mid-day, when water was bubbling up between the setts. This is positive evidence, and although other witnesses spoke to seeing the water first on the Friday, and yet others to not seeing it at all, in my view the learned judge was fully entitled to hold, as he has held, that the water was oozing up, as Mrs. Parker says, on the Thursday.

It is common ground that between the Thursday morning and the time of the accident on Saturday night nothing whatever was done either by the Manchester Corporation or by any local authority or anyone else to abate the misadventure, and the question arises whether the Manchester Corporation who, as the statutory undertakers, had brought the water under the ground, whose service pipe was admittedly perforated, were negligent as the pleading alleges.

The law in such a matter is free from doubt. Neither in the private Act of the Manchester Corporation, of 1847, nor in the Water Clauses Act of that year, is there any clause expressly imposing liability for nuisance, and in such circumstances the obligation of the statutory authority is no higher than an obligation not to be negligent: *Snook* v. *Grand Junction Waterworks Co.* (1); *Green* v. *Chelsea Waterworks Co.* (2), that is to say, they must not omit to do that which reasonable persons would have done, or do that which a person taking reasonable precautions would not have done: per Alderson B., in *Blyth* v. *Birmingham Water Works Co.* (3)

It is important in the present case to distinguish between the two matters of complaint; first, the failure of the Corporation to prevent the leak developing in their pipes, and secondly, the failure to deal with the water when it became apparent on the surface of the road. As to the first, the learned judge has found that the pipes were proper pipes, laid down in a proper manner; that these pipes usually last some eighty years, but that this one failed after twenty-seven years by reason of some latent defect. He held that there was no negligence in the matter of the laying of the pipes and that, not being insurers, but being entitled to carry out their statutory

(1) (1886) 2 Times L. R. 308.
(2) 70 L. T. 547.
(3) (1856) 11 Ex. 781.

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duties, they were not liable. See *Green* v. *Chelsea Waterworks Co.* (1) where Lindley L.J. says (2): "It was argued that the company were liable by reason of the doctrine in *Rylands* v. *Fletcher.* (3) . . . . *Rylands* v. *Fletcher* (3) was not a case of a company authorised to lay down water pipes by Act of Parliament . . . . Here the defendant company were only doing what they were authorized by their Act, and as they were not guilty of negligence they are not liable for damage." As the learned judge points out, that case was approved by Lord Sumner in *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (4) where the learned Lord, speaking of *Green* v. *Chelsea Waterworks Co.* (1) says: "The principle is that if the Legislature has directed and required the undertaker to do that which caused the damage, his liability must rest upon negligence in his way of doing it, and not upon the act itself."

In addition to the evidence with regard to the condition of the pipes, there was evidence that every nine days an official of the Corporation, known as the waterman, goes round the district and listens at the various stop-cocks and hydrants, whereby, it is said, he can hear whether there is any burst in the communication pipes, provided he takes care to listen when there is no traffic in the road. On Wednesday, February 8, the waterman deposed that he had listened at the stop-cock adjacent to the leak of the service pipe and heard nothing. He said there was no traffic and he would have heard the symptomatic noise if the leak had been there. The learned judge appears to be of opinion that no better method of detecting leaks than of so listening for them was proved and he does not find negligence upon the Corporation on that head; at least, so I understand his judgment, and therefore, for all these reasons, so far as the leak in the service pipe was concerned, the respondent cannot and does not complain of the finding of the judge against her.

But there remains the fact that, for one reason or another, the water was allowed to remain on the surface of the road in

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(1) 70 L. T. 547.
(2) Ibid. 548.
(3) (1868) L. R. 3 H. L. 330.
(4) [1914] 3 K. B. 772, 781.

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an increasing lake, later a sheet of ice, according to the measurements of a constable, of some 57 yards long at the time of the accident, and even longer according to other witnesses. I therefore examine what means were taken by the Corporation to acquaint themselves with the consequence of leaks, bearing in mind that nothing was done in this particular case and that the evidence was that throughout the area supplied by the Corporation of Manchester the average number of bursts is fifty a week, so that this was not an extraordinary accident, not reasonably to be anticipated, such as occurred in *Blyth's* case. (1) This area is very much larger than the area of Manchester City, and, in fact, the place where this accident happened, though within the Manchester water area, is for highway purposes under another highway authority, the Eccles Corporation. There is no question but that, apart from the testing of the mains at long intervals by officials of the Corporation, which question does not concern us on this second head of negligence, of failing to observe the roadway for water, the only official of the Manchester Corporation entrusted with any duty at all to deal with possible accumulations of water upon the highway consequent upon bursts was the waterman whose duties only require him to be in any particular place once in every nine days.

Mr. Stuart Bevan argues that in the circumstances of the case this was a sufficient precaution. He says that, while admitting that there was no definite arrangement or undertaking by any one to report the flooding to the Manchester Corporation, there were in fact at least four sources of information which were bound to bring such flooding to the notice of the defendant Corporation within a reasonable time of any such leakage as here occurred. These sources were, respectively, the local officials of the highway authority, the Eccles Corporation; secondly, the police authority, who in this area are the Lancashire County Police; thirdly, the tramways authority, who are under the control of the Salford

(1) 11 Ex. 781.

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Corporation; and fourthly, an indefinite means of communication called by the witnesses "the public."

As to the first of these, the highway authority. There was called for the Corporation a Mr. Buckley, the Road Superintendent in Eccles. He was one of those who deposed that though he bicycled along this road on the Friday there was no sign of water in the road. The judge, as I have said, has not accepted the view that there was no such water, but he is prepared, and I am prepared, to believe that Mr. Buckley did not notice it though there must have been a considerable quantity at that time. Mr. Buckley said he had instructions to report if he saw anything wrong and his business would have been to get hold of the water fitters: "Pending that, if I cannot get hold of them, I get on the telephone, and 'phone through either to the Town Hall, Eccles, or to the Manchester Town Hall, Mains Department." But it was not suggested that he had any special duty to communicate with Manchester, although a Mr. FitzGeorge, who was employed in the waterworks of the Manchester Corporation, confirmed Mr. Buckley that the Eccles Corporation do report to him if they find a burst. In this case, we know in fact that they did not so report, and I cannot find any reason to suppose that Mr. Buckley was in any way acting as an assistant to the waterman when he bicycled about the roads of his borough, and that if he were employed to look for water bursts he was on this occasion in fact entirely useless for this purpose. I would make it clear that I do not think that the defendant Corporation are in any way responsible for Mr. Buckley's negligence, if negligence there was; he was not their servant; but I do hold that the evidence does show that the circumstance of his casual cycling was not one on which the defendant Corporation could rely to excuse themselves from taking proper precautions.

Secondly, as to the police. Here again it was not seriously suggested that there was any organized co-ordination or arrangement between the Police Authorities and the Manchester Corporation. Police Constable Harwood said that, to his knowledge, there was not any instruction to the police to report bursts, though in fact he would report them. Police Constable Virtue said instructions were given by his superiors to report; in fact, though he was in the road on the 10th, he saw no water, nor on the 11th, until after the accident. Mr. FitzGeorge, of the Manchester Corporation, said they did get reports regularly from the police, though whether he was speaking of the Manchester Corporation police or of the police of other local authorities, is not clear. He said that they had no agreement either with the Watch Committee or with the Chief Constable, but that, being public servants, it was the duty of the police so to report. Doubtless, in many cases the police would report to somebody—probably to their own superiors, but that, in my opinion, is a long way from saying that the Manchester Corporation were excused from doing more than sending a workman once every nine days because they could rely upon the police of another local authority, who in fact failed them.

Thirdly, as to trams. Here, there is no real suggestion of an obligation to report. A tramwayman, Mr. Bellingham, first stated that he had no instructions to report bursts either from the Manchester Corporation or from the Salford Corporation. He was not very certain whether he had seen the water in the road on the Saturday or Friday, and contradicted himself more than once. Assuming he only saw the water on the Friday, it is an undisputed fact that he did not report it to anyone. Later, the furthest he would go was to say that if he saw the bursts he would notify the watermen if he happened to see them. Again, contradicting himself, he said he did report bursts, but that the reason why he did not report this particular one was because he was on "late finish."

There remains the question of the public. The waterman himself complained of the lack of spirit of the casual members of the public, and seemed to think them unreliable; and again we know that in fact no member of the public did, though it was evident for nearly three days, report this particular flooding.

I think on the summation of the evidence that the learned judge was fully entitled to come to the conclusion that these

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precarious, unreliable and unco-ordinated methods of receiving information which I have mentioned did not exonerate the Manchester Corporation, knowing, as they did, that not less than six or seven bursts a day took place in their water area, from taking some more effective step to acquaint themselves with the situation than sending round a man every nine days to listen at the water hydrant. In my view, it is not incumbent upon the plaintiff in this case to show how the Corporation could properly perform the duties reasonably imposed upon them: see *Steggles* v. *New River Co.* (1) and *Mose* v. *Hastings and St. Leonard's Gas Co* (2); but if I may hazard a suggestion one method which is apparent and has not been tried, is to provide for a proper co-ordinating system between the various authorities and the Manchester Corporation, with written instructions to the police and the highway authorities—I say nothing of the tramway service, for they work only on certain routes—to inform the Manchester Corporation immediately when they observe flooding in the street, and, what is perhaps more important, to observe the streets carefully to see whether there is flooding. However this may be, in the present case none of these precautions, nor any other precaution save the nine days perambulation, was employed, and I think that the learned judge was justified and was right, on the evidence, in coming to the conclusion that the Corporation failed to discharge the duty which rested upon them and they did not do that which a reasonable authority ought to have done, and failed to take reasonable precautions against an obvious and known danger.

For these reasons, I think that this appeal must be dismissed. The judgment of the learned judge was, by consent, that 2*l.* 10*s.* per week be paid by the defendant Corporation to the plaintiff during widowhood in lieu of a certain sum as damages. This judgment, which is approved by the majority of this Court, is therefore affirmed.

TALBOT J. It is settled by authority binding on this Court

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(1) (1863) 11 W. R. 234; (1865) 13 W. R. 413.

(2) (1864) 4 F. & F. 324.

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that distributors of water for general consumption under the authority of Parliament are not liable for damage caused by the bursting of one of their pipes unless negligence be proved: *Green* v. *Chelsea Waterworks Co.* (1); approved in *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (2) The plaintiff claims in the action damages for the death of her husband, who was knocked down by a motor car on the night of February 11, 1933, and she claims this against the defendant Corporation on the ground that her husband was killed because the car skidded on ice resulting from an escape of water from a leak in one of the Corporation's pipes, and the ice was where it was because the Corporation had not taken reasonable care to discover the existence of the leak. Their failure to do this is the negligence complained of. There is no dispute as to the cause of the man's death, nor can there, I think, be any real doubt as to the duty of the Corporation to take all reasonable measures to detect and remedy leaks in their pipes as soon as practicable. The plaintiff says that she has proved that but for their failure to perform this duty her husband would not have been killed, and the learned judge has so found. He has found that there was no negligence in the laying or maintaining of the pipe or in the material of it; the negligence which he has found is failure "to take all reasonable steps which can be practically taken to inform themselves of the burst."

The decision of the appeal depends partly on the length of time for which water, indicating at any rate the likelihood of a leaking pipe, had shown itself on the road before the accident. As to this, there was some conflict of evidence. Several witnesses swore that they had seen water oozing on to the road before Saturday, February 11, when the deceased man was killed. Two said that they saw it on Thursday, the 9th; one of them, very early on Thursday morning. Two others, one the conductor of a tramcar belonging to the Corporation of Salford, the other a witness called by the defendants, who lived close by, said they saw it on the Friday. On the other hand, a constable stationed at Eccles, who

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(1) 70 L. T. 547.

(2) [1914] 3 K. B. 772, 781.

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patrolled this part of the road for three weeks before February 11, said that he saw no indication of any burst pipe. A road superintendent under the Eccles Corporation said that he had gone along the road twice on the Friday and there was then no sign of a water burst. I do not think that on a point of this kind, particularly as the plaintiff's case on it was directly supported by a witness called for the defendants, we should be justified in differing from the conclusion of the learned judge who saw the witnesses and was satisfied that water from the pipe was on the road early on February 9; that is to say, we must take it that a leak, the signs of which were plainly visible for about sixty-five hours, was not known to the defendants for the whole of that time.

Another matter on which a great deal of evidence was properly called by the defendants was as to what they did to discover leaks of which no indication was to be seen on the surface of the ground. As to this, I accept, as I think the learned judge did, the contention of the defendants that the system did all that could reasonably be expected within its scope. Briefly stated, it secured at fairly short intervals that at the moment at which a test was made it was most unlikely that a leak existed in the mains and pipes then under examination, which the test did not detect. The question therefore remains, and it is that on which the decision of the case turns, whether the defendants have taken all reasonable measures to obtain timely knowledge of the existence of leaks which have shown themselves on the surface of the ground in an interval between two of the regular examinations. It is obvious that this is necessary if the system of examination is to be made as complete as is reasonably practicable, since (as in this very case) a leak may develop after one examination and before the next, which is easily seen on the surface of the street. It was on this point that the learned judge decided against the defendants. The evidence shows that it is by no means uncommon for leaks to be unknown to the defendants, and therefore not attended to, for several days; and it is because (as the facts show) this is what happened in the present case

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that the deceased man, Markland, lost his life. Obviously, if they can reasonably do so, the defendants are bound to guard against this. The pipe which caused the mischief was not within the City; and the Corporation therefore are not the police authority, nor the road authority, nor have they tramways in the road in question; they have not, therefore, the same ordinary access by their own servants to the place where the water collected as they would have had within the City. They do the ordinary routine examinations which water undertakers do, and which are undoubtedly valuable so far as they go; but as to anything more, they rely entirely on the chance that some policeman or road officer, or other servant of another authority, or some householder or other person may give them information. There is no evidence that they have themselves taken any actual measures to secure such help beyond some notice included in the demand note for water charges, or have ever tried to do so. Being in a position (under authority of Parliament) of some disadvantage as water undertakers in a district in which others are responsible for the management of the roads and for police, they appear to have done nothing to secure that other authorities and their servants should take special pains to detect anything which might indicate the existence of a leak in their mains or pipes, and to inform them of it without loss of time.

The learned counsel for the Corporation argued, as I venture to think with some boldness, that not only were they under no duty to do this, but they were entitled to rely absolutely on the existence of authorities charged with the public duties of maintaining roads, of police, and of the operation of tramways, and to assume that, in the course of their discharge of these duties, they would be sure to see and to report to the defendants (although under no legal duty to do so) any indication of a leak visible on the surface of a road. Counsel did not suggest that the defendants were not bound to do everything reasonable and practicable to discover and repair as soon as possible any leak in their pipes, or that it is not important to detect and cure leaks as soon as possible. The

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argument that this duty does not include the use of evidence of leaks visible on the surface of a road, because in that particular place there are other authorities who for other purposes have the duty of observing and acting upon such evidence, is in my opinion plainly fallacious: compare *Brame* v. *Commercial Gas Co.* (1)

It is not pretended that this system or lack of system is satisfactory in its results. On the contrary, the effect of the evidence of Mr. Dalton, the officer of the defendants who has the actual supervision of the district, is that, apart from the periodical examinations, it is unsatisfactory, and that danger is constantly resulting from the omission of people to report what they might and ought to report.

I think also that it was a fair argument for the plaintiff that the sudden appearance of severe frost demanded from the defendants special and prompt action, and that if they had bestirred themselves, they could in all probability have discovered the ice and taken the very simple measures necessary to make the place safe, in ample time to avoid this accident.

An argument was vigorously pressed by counsel for the defendants which I find great difficulty in appreciating. Witnesses were called, experienced in other large water undertakings, to prove that the system of testing mains and pipes for leaks used by the defendants is that generally recognized as efficient, and is both efficient and sufficient. This, which concerns only the method of detecting leaks before they have produced any effect visible above ground, is accepted by the learned judge and is not challenged on this appeal. The defendants' counsel contends, as I understand him, that this concludes the case, in the absence of any evidence that the system needs supplementing by something more. It is admitted that, efficient as the system may be for its own purpose, it does not prevent the frequent occurrence of bursts or leaks, nor does it prevent those bursts or leaks from often remaining undetected and unremedied for some days.

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(1) [1914] 3 K. B. 1181.

The question on this appeal is whether in this particular case the defendants might not, by taking reasonable and practicable measures, have detected the leak which caused the death of the plaintiff's husband before it had become dangerous. I do not understand how it can be said that expert evidence was necessary on this point. The indications of the escape of water were quite plain; they were seen by several persons who make no claim to expert knowledge; and the whole question is whether it was proved that the defendants did not adopt sufficient measures for securing that such indications were made known to them in sufficient time, in the circumstances, for the safety of those using this road. I do not think that it is the correct way of stating the plaintiff's case to say that the defendants are responsible for negligent omission by persons other than their own servants to detect and report leaks. It is rather that the defendants might and ought to have done more, whether by their own exertions or by arrangement with their neighbours, to discover and repair leaks occurring in the time between their examinations of the pipes; and that in fact they did practically nothing.

I do not think, with all respect to the argument of those who think differently, that the Court has to say what particular arrangements the defendants should make in order to get the information which is needed to prevent danger from leaks to persons using roads in which their pipes are. I have indicated some which seem to me obvious. It cannot, as I think, be maintained seriously that nothing could be done except the employment of men to keep perpetual watch in every street in the area. In connection with this it is, I think, worth while to refer to *Steggles* v. *New River Co.* (1) The action there was for an escape of water into the plaintiff's cellar (the plaintiff being the licensee of a public-house) caused by the effect of frost on a plug in the pipe of the defendants. The cause was twice tried because the jury disagreed on the first trial. It was tried first before Cockburn C.J. and, secondly, before Mellor J. Both learned

(1) 11 W. R. 234; 13 W. R. 413.

judges, according to the report, laid down the law in the same way, following *Blyth* v. *Birmingham Waterworks Co.* (1)—namely, "that although the company were not liable for the unforeseen results of an extraordinary frost," which this was, "they were bound to use reasonable care and precaution to guard against such consequences as might be reasonably foreseen to be likely to result from ordinary frost. There was some evidence, though slight, that it was known that the effect of frost was to 'start' the plugs in the pipes, and that the result of this, if the frost also congealed the slush and earth in the aperture and thus prevented the plug from being quite forced out, would be that the water would escape at the sides, and trickle through the soil; and there was also some evidence that it would be possible to take some precautions to prevent this," and I draw particular attention to these next words, "though what they should be did not very distinctly appear." A rule had been obtained—by leave reserved—to set aside the verdict for the plaintiff, which was found at the second trial, and to enter a non-suit, on the ground that there was no evidence of negligence. The argument for the plaintiff, who had to show cause, begins in these words: "Unless the company is to be at liberty to neglect all precautions, there was evidence to sustain this verdict, for no precautions were taken." The argument for the defendants, in support of the rule, is important in the connection in which I refer to this case because it makes the very point: "There was no evidence of negligence, for nothing definite was or could be suggested which the company ought to have done. The verdict evidently went upon the supposed neglect to visit the plugs quite recently," and then there is an argument that if they had been visited it would have made no difference. Then the argument proceeds: "It must be taken, in the absence of any evidence to the contrary, that it was not so, and then where was the negligence?" Learned counsel pointed out that the frost, in the case of *Steggles* v. *New River Co.* (2) as in the case of *Blyth* v. *Birmingham Waterworks Co.* (1), was extraordinary and

(1) 11 Ex. 781.

(2) 11 W. R. 234; 13 W. R. 413.

sudden, " for it came on the very night when the plug must have first started. It was not shown how the company could prevent the 'slush' from getting into the aperture or prevent the plug from starting, or the water from escaping." The Court of Queen's Bench discharged the rule, and the summary of the judgment is very short. They said, with regard to *Blyth's* case (1), the case was different, " because here it appeared that it was known that the effect of frost might be to cause the plugs to start, and that some precaution might be taken to prevent the water from escaping through the soil," and they added these words, to which I again call attention, " though what those precautions were did not very distinctly appear. There was, therefore, some evidence for the jury, and though the verdict might possibly have been deemed to be hardly satisfactory, still it could not be set aside without evidence to warrant it; and therefore rule discharged." That case was taken by appeal to the Exchequer Chamber (2), where it was heard by a very strong Court, composed of Erle C.J., Pollock C.B., Willes and Keating JJ., and Pigott B. The appeal was dismissed.

I will mention also the summing-up of Pollock C.B. in *Mose* v. *Hastings and St. Leonards Gas Co.* (3), which was referred to by the learned judge at the trial of this action. There, though the action was against a gas company, and not, as here, water undertakers, the claim was based on negligence, and the issue was therefore the same.

In my opinion the learned judge was entitled to find that the length of time during which the Corporation were ignorant of the unmistakable symptoms of this leak is, in the circumstances, prima facie evidence that they had not done all that they could reasonably have done to find it out, and that he was right in holding that the plaintiff had discharged the burden of proof which was upon her, and that no evidence sufficient to rebut her case had been adduced. I think therefore that the judgment should be affirmed.

*Appeal dismissed.*

(1) 11 Ex. 781.

(2) 13 W. R. 413.

(3) 4 F. & F. 324.

Solicitors for appellants: *Sharpe, Pritchard & Co., for F. E. W. Howell, Town Clerk, Manchester.*

Solicitor for respondent: *S. G. Carnt, for Flint & Holmes, Manchester.*

J. S. H.

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*Jan. 25.*

## ELLEN STREET ESTATES, LIMITED *v.* MINISTER OF HEALTH.

*Local Government—Improvement Scheme—Acquisition of land—Lapse of Scheme and Order—Power of local Authority to make and of Minister to confirm new Scheme—Statutory Provision that other Acts inconsistent therewith "shall cease to have or shall not have effect"—Effect on subsequent Acts—Acquisition of Land (Assessment of Compensation) Act,* 1919 (9 & 10 *Geo.* 5, *c.* 57), *ss.* 2, 7—*Housing Act,* 1925 (15 *Geo.* 5, *c.* 14), *s.* 46—*Housing Act,* 1930 (20 & 21 *Geo.* 5, *c.* 39), *s.* 64.

In 1922 an improvement scheme under the Housing Acts was made by a local authority and confirmed by the Minister of Health, but before it was attempted to be enforced the local authority's powers of compulsory purchase had lapsed:—

*Held,* that the local authority were not thereby precluded from making a new scheme under the Housing Act, 1930, or the Minister from confirming it.

Sect. 7 of the Acquisition of Land (Assessment of Compensation) Act, 1919, enacts that the provisions of the Act or order by which land is authorized to be acquired, or of any Act incorporated therewith, "shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect."

*Held,* (1.) that Parliament cannot bind itself as to the form of subsequent legislation and cannot effectively enact that a provision in one statute shall not be altered by a subsequent Act save by express words, and (2.) that s. 46 of the Housing Act, 1925, so far as its provisions are inconsistent with those of the Act of 1919, has repealed by implication the provisions of that Act.

*Vauxhall Estates Ld.* v. *Liverpool Corporation* [1932] 1 K. B. 733 approved and followed.

Decision of Swift J. affirmed.

Appeal from a decision of Swift J.

In or about 1922 Nathan Lithman acquired a sub-lease for a period exceeding sixty years of certain property in Ellen Street and Berners Street, Stepney, paying 5500*l.* for same. At that time he was not aware that the London

County Council had just passed a resolution to deal with an area, which comprised his property, by means of an improvement scheme under the Housing Acts, 1890 to 1921; but shortly after his purchase he was served with notice of the scheme, and in due course a local inquiry was held at which no real objection was offered by him to the proposed scheme, as he was under the impression that he would receive compensation. The scheme was duly confirmed by the Minister of Health and an arbitration was held to determine the amount of compensation to be paid to Lithman, but the arbitrator's award stated the amount of compensation to be nil. As, however, a period of three years had elapsed since the date of the confirmation of the order before the London County Council sought to put in force their powers with respect to Lithman's property their powers of compulsory acquisition had lapsed, whereupon they made a fresh order under Part I. of the Housing Act, 1930, and a local inquiry was again held at which the point was taken on behalf of Lithman that the Minister had no jurisdiction to hold a second inquiry on the grounds (1.) that if his decision condemning the property in 1922 was right, it would be legally impossible for him to give a different decision on the second inquiry; (2.) that it was contrary to principles of justice that a person should have his case tried by some one who had already decided against him; and (3.) that by s. 64 of the Housing Act, 1930, the earlier improvement scheme was preserved. Notwithstanding these objections the Minister confirmed the order declaring the area in question to be a clearance area. The confirming order contained the following clause 3: "Subject to any necessary adaptations the provisions of (*a*) the Lands Clauses Acts (except sections 127 to 132 of the Lands Clauses Consolidation Act, 1845); (*b*) the Acquisition of Land (Assessment of Compensation) Act, 1919 . . . . as modified by Part I. of the Second Schedule to the Housing Act, 1930, in the case of compulsory purchase orders made for the purposes of the Housing Act, 1930, are hereby incorporated in this Order and the provisions of those Acts shall apply accordingly."

The London County Council having proposed to exercise their compulsory powers for the acquisition of the property in question, Ellen Street Estates, Ld., as assignees of Lithman, applied under s. 11 of the Housing Act, 1930, as persons aggrieved, to have the confirmed order quashed as having been made and confirmed without jurisdiction.

Swift J. dismissed the application.

The Ellen Street Estates, Ld., appealed.

*H. A. Hill* (*A. W. Nicholls* with him) for the appellants. The effect of the Minister confirming the order now in question is to revoke or repeal by implication the order previously confirmed by him. That, however, he had no jurisdiction to do, seeing that s. 64 of the Housing Act, 1930, preserves the former order. It is true that by lapse of time the compulsory powers of purchase under that order are no longer exercisable, but that does not prevent the local authority acquiring the property by agreement.

Secondly, clause 3 of the order is ultra vires and thereby makes the whole order invalid. The combined effect of that clause and s. 46 of the Housing Act, 1925 (1), is to constitute a basis of compensation inconsistent with that prescribed by s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919 (2), a mode of assessment which s. 7 says is to

(1) Housing Act, 1925, s. 46, sub-s. 1: "Where land included in any improvement or reconstruction scheme made under this Part of this Act . . . . is acquired compulsorily, the compensation to be paid for the land, including any buildings thereon, shall be the value at the time the valuation is made of the land as a site cleared of buildings and available for development in accordance with the requirements of the building bye-laws for the time being in force in the district:

Provided that, if in the opinion of the Minister it is necessary that provision should be made by the scheme for the re-housing of persons of the working classes on the land or part thereof when cleared, or that the land or a part thereof when cleared should be laid out as an open space, the compensation payable to all persons interested in any land included in the scheme . . . . for their respective interests therein shall be reduced by an amount ascertained as follows: . . . ."

Sub-s. 2: "Subject as aforesaid, the compensation to be paid for such land shall be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919."

(2) Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2: "In assessing compensation,

prevail, at all events till there has been an express repeal of the Act of 1919. There has been no express repeal of that statute, and therefore s. 46 of the Act of 1925 has never had statutory force. It is submitted that it is within the competence of Parliament to pass an Act saying that as regards any specific provision in it a repeal can only be effected in express terms, and not by implication. This implies no fetter on the powers of Parliament. It is true that in *Vauxhall Estates Ld.* v. *Liverpool Corporation* (1) the Divisional Court rejected this contention, but it is submitted that that case was wrongly decided.

*Sir Thomas Inskip A.-G.* and *Bowstead* for the Minister.

*H. G. Robertson* for the London County Council was not called upon.

Scrutton L.J. This is an appeal from Swift J., to whom are assigned cases under the Housing Act. It arises in this way: a person purchased certain houses in Stepney, being unaware at the time that the area in which the houses were situated was being dealt with by a clearance order. The houses in question were included in that area as being "by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area." The first proceedings were in or about the year 1922. There was a public inquiry at which the then owner (who has now assigned his interest to the Ellen Street Estates Company, Ld.) appeared by his son, and he being under the impression that he would receive compensation, raised no objection to the proposed order.

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an official arbitrator shall act in accordance with the following rules:—(2) The value of land shall . . . . be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise. . . . ."

Sect. 7, sub-s. 1: "The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect: . . . ."

[The marginal note to s. 7 is: "Effect of Act on existing enactments."]

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Thereafter the proceedings as to carrying out the order drifted along, partly owing to difficulties as to re-planning, and partly owing to certain other cases which were on their way to the House of Lords, and it was not till some five or six years later that the appellants proceeded to obtain the amount of compensation assessed, and this the arbitrator assessed at nothing. The appellants' solicitors then discovered a provision in the Housing Act that a compulsory purchase under the scheme could not be enforced later than three years after the date of the order, and three years had in fact elapsed. Negotiations went on, and ultimately the local authority determined to start again with a fresh application for an order under the Housing Act, 1930, and after a public inquiry at which the owners were heard, an order was made and approved by the Minister. Thereupon the appellants objected to the whole proceedings, and the matter came before Swift J., before whom it was contended, as it has been before us, that it is now impossible to make any order as to these houses, and because an order made under the previous Housing Act was not enforced no subsequent order in respect of the same houses can be made. That argument was based by Mr. Hill upon s. 64 of the Housing Act, 1930, which provides that where before the commencement of that Act a closing order has been made or any scheme or order has been confirmed, the like proceedings, and, in the case of London, proceedings for the acquisition of additional land may be taken thereon, and the like consequences shall ensue as might have been taken or would have ensued if the Act of 1930 had not been passed. If that Act had not been passed, in view of the circumstances I have stated, compulsory purchase could not have gone on, because proceedings had not been taken within the proper time, and consequently nothing could be done for compulsory purchase under the earlier order; but Mr. Hill argues that, in some way which I do not follow, these houses, although in an unhealthy or dangerous condition, must remain for the remainder of the lease as they are unless the local authority choose to pay what the appellants ask for them, although the arbitrator has held that the appellants are entitled to nothing. I cannot understand why a plan for an area which has been sanctioned but cannot be carried out owing to the lapse of time prevents new proceedings being taken in respect of the same houses, which by their situation are in a condition dangerous to health. That point, in my opinion, fails.

The second point advanced by Mr. Hill seems to me even more impossible. It is this: the Acquisition of Land (Assessment of Compensation) Act, 1919, lays down certain principles on which compensation for land taken is to be assessed. Sect. 7, sub-s. 1, says this: "The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect." Mr. Hill's contention is that if in a later Act provisions are found as to the compensation to be paid for land which are inconsistent with those contained in the Act of 1919, the later provisions are to have no effect. Such a contention involves this proposition, that no subsequent Parliament by enacting a provision inconsistent with the Act of 1919 can give any effect to the words it uses. Sect. 46, sub-s. 1, of the Housing Act, 1925, says this: "Where land included in any improvement or reconstruction scheme . . . . is acquired compulsorily," certain provisions as to compensation shall apply. These are inconsistent with those contained in the Acquisition of Land (Assessment of Compensation) Act, 1919, and then s. 46, sub-s. 2, of the Act of 1925 provides: "Subject as aforesaid, the compensation to be paid for such land shall be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919." I asked Mr. Hill what these last quoted words mean, and he replied they mean nothing. That is absolutely contrary to the constitutional position that Parliament can alter an Act previously passed, and it can do so by repealing in terms the previous Act—Mr. Hill agrees that it may do so—and it can do it also in another way—namely, by enacting a provision which

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is clearly inconsistent with the previous Act. In Maxwell's Interpretation of Statutes I find three or four pages devoted to cases in which Parliament, without using the word "repeal," has effected the same result by enacting a section inconsistent with an earlier provision. It is impossible to say that these words that compensation shall be assessed in a particular way and, subject as aforesaid, shall be assessed in accordance with the provisions of the Act of 1919 have no effect. This point was not dealt with before Swift J., because in *Vauxhall Estates Ld.* v. *Liverpool Corporation* (1) a Divisional Court rejected Mr. Hill's argument and held that the provisions of the Act of 1925, so far as they were inconsistent with, must prevail over, those of the Act of 1919. In the present case the matter is carried a step further, because s. 12 of the Housing Act, 1930, says in effect that compensation shall be assessed in accordance with the provisions of the Act of 1919 except as altered in a series of matters which the Act of 1930 prescribed. In my opinion *Vauxhall Estates Ld.* v. *Liverpool Corporation* (1) was rightly decided, and Mr. Hill's point fails and the appeal must be dismissed.

Maugham L.J. I agree. It is contended that as the result of s. 64 of the Housing Act, 1930, which is a repealing section in a familiar form, a scheme or order confirmed or approved by the Minister under one of the repealed Acts precludes the possibility of any fresh scheme relating to the same area or part of it being made under the Housing Act, 1930. As to that it is to be observed that the proviso to s. 64 says that where before the commencement of the Act certain proceedings have been begun under the repealed Act the like proceedings may be taken thereon and the like consequences shall ensue as might have been taken or would have ensued if the Act of 1930 had not been passed. In the present case the argument was presented on the footing that the previous scheme had become abortive, owing to the lapse of time in acquiring certain lands. The facts are peculiar in that the arbitrator, who was appointed to determine the compensation payable to the appellants, came to the conclusion that nothing was payable, a conclusion which possibly might have caused some difficulty if the County Council had thereupon desired a conveyance, because it is more difficult to put the machinery of conveyance in force if you cannot pay or tender a sum to the person who ought to convey ; but, however that may be, the appellants submitted that three years having elapsed after the time when compulsory powers were given, the procedure to obtain conveyances could not be carried out, and accordingly the scheme was pro tanto abortive. I can find nothing in s. 64 which precludes a fresh scheme under the new Act being prepared by virtue of a resolution under s. 1 and the consequent proceedings as regards a closing order. Accordingly, I cannot accede to Mr. Hill's first point.

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(1) [1932] 1 K. B. 733.

The second point, which raises a question of constitutional law, is based upon the terms of s. 7 of the Acquisition of Land (Assessment of Compensation) Act, 1919. That section is in one respect in a peculiar form. It begins thus : "The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect." Mr. Hill contends that as regards subsequent legislation, in the absence of an express repeal of this provision of the Acquisition of Land (Assessment of Compensation) Act, 1919, the provisions of that Act must apply, however clear the intention of Parliament, as expressed in the subsequent Act, is to modify the provisions of the Act of 1919. I am quite unable to accept that view. The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature. This second point also fails.

Talbot J. I agree, and I only wish to add a word with regard to the meaning of the phrase "or of any Act incorporated therewith" in s. 7 of the Act of 1919. That phrase seems to be merely intended to include the Acts which are incorporated with the vast majority of Acts authorizing the acquisition of land, such, for example, as the Lands Clauses Acts. In *Vauxhall Estates Ld.* v. *Liverpool Corporation* (1) one of the judges was inclined to favour the view that s. 7 of the Act of 1919 did not apply to any save then existing Acts, but he abstained from offering a final opinion on the point. I think there is a great deal to be said for the view that the marginal note, which I agree is no part of the statute, correctly states the effect of the section and that it has no application to future enactments; but I agree with the judgments of Scrutton L.J. and Maugham L.J. as to the reasons for rejecting Mr. Hill's second point.

*Appeal dismissed.*

Solicitors for appellants: *Knapp-Fisher & Wartnaby.*

Solicitor for Minister of Health: *Solicitor to Ministry of Health.*

Solicitor for London County Council: *Solicitor to Council.*

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(1) [1932] 1 K. B. 733.

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# QUEEN ANNE'S BOUNTY *v.* EXECUTORS OF WILLIAM BLACKLOCKS.

1934
*Jan.* 26, 30.

*Tithe Rentcharge—Recovery—Order for distress—Limitation on right of distress—"Not more than two years' arrears"—Tithe Act,* 1836 (6 *&* 7 *Will.* 4, *c.* 71), *s.* 81—*Tithe Act,* 1891 (54 *Vict. c.* 8), *s.* 2, *sub-s.* 2; *s.* 10, *sub-s.* 2.

The owner of tithe rentcharge obtained from the county court judge in May, 1932, an order for the payment of a sum on account of arrears for three consecutive half-years ending October 1, 1931. In November, 1933, application was made to the county court judge to direct the officer of the court to distrain for that sum under s. 2, sub-s. 2, of the Tithe Act, 1891. He refused, on the ground that by the proviso to s. 81 of the Tithe Act, 1836, "not more than two years' arrears shall at any time be recoverable by distress" and that the arrears claimed went back more than two years before the date of the proposed distraint:—

*Held*, reversing the county court judgment, that there is nothing in s. 81 of the Act of 1836 which limits the two years' arrears to the period immediately antecedent to the date of the distress, but that the section deals with quantum only. The time limit is found in s. 10, sub-s. 2, of the Act of 1891, which enacts that tithe rentcharge shall not be recoverable unless proceedings for its recovery have been commenced before the expiration of two years from the date at which it became due. The present proceedings having been so commenced the owner of the tithe rentcharge was entitled to have a distress levied by the officer of the county court, and the judge should have directed him accordingly.

Appeal from Ashford County Court.

On March 26, 1932, the appellants, Queen Anne's Bounty, gave notice to the respondents, the executors of William Blacklocks, deceased, of their intention to apply for an order for the recovery of 17*l.* 5*s.* 8*d.* due in respect of three consecutive half-years' tithe rentcharge ending October 1, 1931, issued out of the lands of the respondents as such executors. On May 2, 1932, the county court judge of Ashford made the order and appointed an officer of his court to distrain upon the lands liable in respect of that sum. On July 7, 1932, the above officer gave notice to the defendants that he intended to levy distress on and after July 19, 1932. Some delay ensued, but on November 1, 1933, the appellants intimated to the registrar of the county court that they desired that the order should be executed. The officer of the

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court did not comply, giving as his reason a decision by the county court judge given in another case since the making of the order. On an application on December 4, 1933, to the said judge by the appellants asking that the officer of the court should be directed to execute the above order of May 2, 1932, the judge refused the application on the ground that by reason of the proviso to s. 81 of the Tithe Act, 1836 (6 & 7 Will. 4, c. 71), the officer could not distrain for "more than two years' arrears," and that the arrears, the subject-matter of the said order, went back further than two years.

Sect. 81, after enacting that when rentcharge was in arrear for twenty-one days the person entitled thereto might distrain, added "Provided that not more than two years' arrears shall at any time be recoverable by distress."

Queen Anne's Bounty appealed.

*Singleton K.C.* and *Sandlands* for the appellants. The county court judge was wrong. The words of s. 81 of the Tithe Act, 1836, "not more than two years' arrears shall . . . . be recoverable" are not a provision as to time but as to quantum. The Act of 1836 imposed no time limit. A time limit was first imposed by s. 10, sub-s. 2, of the Tithe Act, 1891 (54 Vict. c. 8), which enacts that tithe rentcharge "shall not be recoverable . . . . unless proceedings for such recovery have been commenced before the expiration of two years from the date at which it became payable." "Proceedings" in that sub-section mean the proceedings which resulted in the order of May 2, 1932—namely, the notice of March 26, 1932: *Rex* v. *Judge Clements. Ex parte Ferridge.* (1) Therefore the appellants were in time under the Act of 1891. If there is any conflict between s. 81 of the Act of 1836 and s. 10, sub-s. 2, of the Act of 1891, the latter, being later in date, must prevail. The passage in the judgment of Bacon V.-C. in *Bailey* v. *Badham* (2), if it is against this contention, was obiter dictum. And the fact that by reason of s. 81 of the Act of 1836 the defendants had lost their remedy was assumed as a fact and not argued in *Durrant* v. *Ecclesiastical*

(1) [1932] 2 K. B. 535.

(2) (1885) 30 Ch. D. 84, 89.

*Commissioners* (1), and in any case it was not necessary to the decision.

The obtaining of the order of the county court of May 2, 1932, was the only way of recovering tithe, and that order was a judgment and order of the court, and the right to tithe rentcharge was merged therein.

[The Annual County Courts Practice, 52nd ed., p. 2528, was also referred to.]

*Pritt K.C.*, *A. W. Roskill*, and *Miss H. M. Cross* for the respondents. This is a question of construction—namely, as to the effect of s. 10, sub-s. 2, of the Act of 1891 on s. 81 of the Act of 1836. The natural meaning of "two years' arrears" in the latter section is tithe rentcharge which has been unpaid for two years, and not the amount of tithe rentcharge for two years, and the time must be calculated from the time of the distress, for at the time of the passing of the Act of 1836 there was no other time to calculate from. Sect. 10, sub-s. 2, of the Act of 1891 is not, as suggested, a proviso to s. 81 of the Act of 1836, but deals only with the remedy, the execution. Before the passing of the Act of 1891 distress by the owner of tithe rentcharge was the only method of recovery; by s. 2, sub-s. 2, of that Act the county court was substituted for the owner, whose officer has "like powers of distraint" as had the owner, "and no greater or other powers." By the terms of s. 81 the whole of the arrears must be distrained for in the distraint thereby authorized, subject to the limitation that there must not be distraint for more than two years' arrears. It seems to be clear, therefore, that the owner of tithe rentcharge cannot pick and choose which two years he will distrain for, but is confined to the last two years' arrears. If this is not so the tithe payer would get no advantage under a section passed to confer an advantage on him, for on the appellants' construction the owner might have distrained for the two years preceding the distraint, and then next day could have distrained for the two years preceding them, and so on. The passing of s. 10, sub-s. 2, of the Act of 1891 prevents that in any case.

(1) (1880) 6 Q. B. D. 234.

The order of the county court was not a judgment, because no person was bound under it.

*Singleton K.C.* replied.

LORD HEWART C.J. This is an appeal from the dismissal by the learned county court judge at Ashford on December 4 last of an application that he should give directions to the officer appointed by him to distrain under the Tithe Acts. The matter arises in the following way. On March 26, 1932, the agents for Queen Anne's Bounty gave notice of an application for an order for the recovery of the sum of 17*l.* 5*s.* 8*d.* due in respect of the tithe rentcharge issued out of certain lands for the period of three consecutive half-years ending October 1, 1931. Now that application, as was held by this Court in the case of *Rex* v. *Judge Clements. Ex parte Ferridge* (1), was the origin of the proceedings and, that application having been made, the learned judge on May 2, 1932, made an order that the sum referred to be recovered together with the costs, and appointed for the purpose of that recovery an officer, Mr. Joy, to distrain upon the lands liable to be distrained upon under s. 81 of the Tithe Act, 1836. In pursuance of that order, Mr. Joy, by letter dated July 7, 1932, gave notice to the respondents, the executors of Mr. W. Blacklocks, deceased, that he had been appointed by the court to distrain upon their lands for tithe rentcharge in arrear, and that he intended to levy distress on and after July 19, 1932. There followed some delay, the reason for which has not been precisely stated, but it is easy to infer that the Governors of Queen Anne's Bounty were holding their hands; but there came a time when, on November 1, 1933, the solicitor to the Governors of Queen Anne's Bounty wrote to the registrar of the Ashford County Court referring to certain orders for recovery by distress of tithe rentcharge including the order already mentioned, and saying that the Governors of Queen Anne's Bounty did not wish the execution of these orders to be suspended any longer, and that he would, therefore, be obliged if he would kindly take the necessary

(1) [1932] 2 K. B. 535.

steps to have them executed. Execution, however, did not take place for the reason given in the words employed by the learned judge himself, that his officer said to himself: "In the meantime a case has been heard in the court of which I am an officer, and it has been held by the judge that the officer appointed to distrain could not distrain for more than two years previous to the date of the distress and, therefore, I cannot go back further than two years from the day on which I do actually distrain."

That deadlock having arisen, an application for directions was made pursuant to a notice dated November 14, 1933, an application whereby the learned judge was asked for an order in effect directing the officer of the court to execute the order which he had already made, and directing him to take all proper and necessary steps to recover the sum of 17*l.* 5*s.* 8*d.* and costs. The learned judge having that application for directions before him dismissed it, and dismissed it upon the ground that, as he held he was right in the opinion which he had formed in the meantime upon another case, he was limited to a period of two years from the date of the distress, and accordingly the learned judge declined to direct the officer of the court to fulfil the order which had been made by him on May 2, 1932. The question for us is whether in so dismissing the application the learned judge was right, and the answer to that question depends upon the construction of certain sections in the Tithe Act, 1836, and the Tithe Act 1891.,

Mr. Pritt, for the respondents, has taken two technical points, to which it is not necessary to refer in more than a sentence. He has taken them, as he says, in order to keep them open. The first is that the officer, and not the Governors of Queen Anne's Bounty, was the proper person to apply for directions, if any. That point has already been decided by this Court in *Rex* v. *Judge Clements. Ex parte Ferridge.* (1) The second point was that the learned judge was, so to speak, functus officio, so that, having made one order in this matter he could not, the argument runs, make another. But in my view what he was being asked to do was not to make another order, but to give directions upon the order which he had already made.

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Sect. 81 of the Tithe Act, 1836, provides as follows: "In case the said rentcharge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rentcharge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years; provided that not more than two years' arrears shall at any time be recoverable by distress."

The argument of Mr. Pritt is that these words "not more than two years' arrears" mean not more than the last two years' arrears, the time counting from the time of the distress, and that as by s. 2, sub-s. 2, of the Tithe Act, 1891, the officer of the court is to have "the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge, and no greater or other powers," it follows that after the passing of the Act of 1891 the distress must be limited to two years' arrears counting back from the date of the distress. With all respect to the able argument of Mr. Pritt I do not think that that contention is sound. I think that s. 81 of the Tithe Act, 1836, is dealing merely with the quantum which is to be recovered, and is not dealing with time. That which may be recovered by distress is: "not more than two years' arrears," and there is nothing in the section in my view which limits those two years to the period immediately antecedent to the date of the distress, and it is admitted that is the meaning to be given to the words "no greater or other powers" in s. 2 of sub-s. 2 of the Tithe Act, 1891, if that interpretation be adopted. But the Act of 1891 did introduce a time limit, a time limit for proceedings, namely, by s. 10, sub-s. 2, which provides as follows: "A sum on account of tithe rentcharge shall not be recoverable under this Act unless proceedings for such recovery have been commenced before the expiration of two years from the date at which it became payable."

Now, here, as the document shows, the period of the arrears was three half-years ending October 1, 1931, and proceedings for recovery were commenced by the application dated March 26, 1932, as I have said. They were therefore in time, and the Governors of Queen Anne's Bounty were entitled to ask for an order for the recovery by distress of the tithe rentcharge for those three consecutive half-years. More than that, after the order dated May 2, 1932, had been made by the county court at Ashford, it was the duty of the officer of the court to fulfil that order, and it was not open to the learned judge to hold, as he has held, that because of a decision in the meantime—a decision which he thought and still thinks is right—effect should not and could not be given to that order. It was, by whatever name it be called, an order for the recovery of a certain sum of money, 17*l.* odd, and it was the duty of those who were concerned to see that that order was duly fulfilled.

Our attention has been directed to two cases, neither of which is really to the point. Both of the cases were before the Act of 1891. One is the case of *Bailey* v. *Badham* (1) and the other is *Durrant* v. *Ecclesiastical Commissioners.* (2) But in my view neither of those cases throws any useful light upon the question which we have to determine. It seems to me that the matter is capable of quite brief statement. The Act of 1836 is dealing with quantum. The Act of 1891, in s. 10, sub-s. 2, is dealing with a time limit for proceedings. The two sections work quite harmoniously together, and with s. 2, sub-s. 2, of the Act of 1891.

I think, therefore, that the learned judge of the county court was in error in the opinion that he expressed and in dismissing the application which was made. I think, therefore, that this appeal ought to be allowed with costs here and below, and that the case ought to go back to the learned judge with the opinion of the Court that he do direct the officer of his court duly to fulfil the order made by him on May 2, 1932.

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(1) 30 Ch. D. 84.

(2) 6 Q. B. D. 234.

AVORY J. I am of the same opinion. I do not think that the view entertained by the learned county court judge as to the meaning of the proviso to s. 81 of the Act of 1836 can be supported. I agree entirely with what my Lord has said as to real meaning of that proviso—namely, that it relates only to the quantum of the arrears which can at any time be recoverable by distress, and the order in this case which was made on May 2, 1932, implemented as it was by the notice given by the bailiff on July 7, 1932, was at the time when it was made, and still remains, an effective order. It is quite immaterial in my view whether it is called a judgment or by any other name. It is undoubtedly within the meaning of s. 2, sub-s. 1, of the Tithe Act, 1891, an order that a certain sum due on account of tithe rentcharge shall be recovered together with costs, and that order in my opinion remained an effective order notwithstanding any view that the learned county court judge may subsequently have formed as to the meaning of the proviso to sec. 81 of the Act of 1836. When he was called upon by the notice of November 14, 1933, to give directions to his officer to execute the said order, it was, and became, the duty of the learned county court judge to give those directions to an officer who at that time was objecting that he was unable to proceed because of the view which the learned county court judge had expressed in some other case.

I agree, therefore, in the result which my Lord has indicated that this appeal should be allowed, and that the learned county court judge should give the necessary directions to the officer to proceed.

CHARLES J. I agree. The matter does not seem to me to be really in any way obscure. I will not go over again the circumstances that give rise to this appeal. I will only say that under s. 10, sub-s. 2, of the Tithe Act, 1891, it is set forth that " A sum on account of tithe rentcharge shall not be recoverable under this Act unless proceedings for such recovery have been commenced before the expiration of two years from the date at which it became payable." That sets a time limit upon the tithe owner who is seeking to recover a sum on account of tithe rentcharge. The proceedings are started by the application. The application was made and related to a period of a year and a half, the first period being from October 1, 1930, and the application being in March, 1932. That application having been made, and an order having been made thereon ordering that the sum claimed should be recovered, one has to look to see what machinery has been provided by the Acts of Parliament in order to implement that order, and we turn to sub-s. 2 of s. 2 of the same Act of 1891, and we find there that the court may appoint and direct an officer of the court to distrain for the recovery of the sum ordered to be paid.

Now, it is said that to that right there are grave limitations, and that those limitations are to be found in the Tithe Act, 1836, in s. 81. That section appears to me to be for the benefit both of the tithe owner and of the payer of the tithe rentcharge, for it is said that distraint may be made—I am paraphrasing the section—" for all arrears of the said rentcharge." Now, that is in favour of the rentcharge owner, but it goes on to say that; " not more than two years' arrears shall at any time be recoverable by distress." We are asked to say, by Mr. Pritt, that that means that the last two years' rentcharge, or sum due as rentcharge, are the only two years that may be considered; that all the years before that, if they have been the subject of unpaid tithe rentcharge, and so are the subject of arrears, have died a natural death, that they are dead and are cancelled out, and that they can never be looked at again. That seems to me entirely inconsistent with the right given in that section to the tithe owner to distrain for all arrears, and, speaking for myself, it seems to do violence to the common reading of the proviso that I have already read, and will read again, " that not more than two years' arrears shall at any time be recoverable by distress." I rather think that it is in favour of the tithe payer to this extent, that even if he had not seen his way for one reason or for another reason, be it a good reason or a bad reason, to pay the tithes in past years—two, three, four, five or six—that yet he is protected from a sudden onslaught by the tithe owner who seeks to get all arrears at one blow; it says to the tithe owner: "That you cannot do; you cannot recover by distress more tithe in arrears than two years at a time." That is, I believe, what the section means.

With those observations, which I have thought it proper to make, I agree entirely with the judgments of my Lord and Avory J., and I agree that the matter should be returned to the county court judge with the direction that has been indicated.

*Appeal allowed.*

Solicitors for appellants: *Moodie, Sons & Brown, for Fielding & Pembrook, Canterbury.*

Solicitor for respondents: *Edward F. Iwi.*

W. L. L. B.

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1933

*Nov.* 27, 28, 29.

## SWAFFER *v.* MULCAHY.

[1933. S. 2391.]

## HOOKER *v.* MULCAHY.

[1933. H. 2330.]

## SMITH *v.* MULCAHY.

[1933. S. 2393.]

*Tithe Rent-charge—Recovery of arrears—Application to County Court—Appointment of Officer to distrain—Notice to tithe-payer—No distress levied—Appointment of another Officer—No further notice—Distress—Replevin—Sheep—" Beasts which gain the land "—Whether privileged if other distress available—Things in actual use—Bailee's right to replevy—*51 *Hen.* 3, *stat.* 4, *and Les Estatuz del Eschekere : Districciones Scaccarii —Tithe Act,* 1836 (6 *&* 7 *Will.* 4, *c.* 71), *s.* 81*—Tithe Act,* 1891 (54 *Vict. c.* 8), *s.* 2.

1933

SWAFFER
v.
MULCAHY.
HOOKER
v.
MULCAHY.
SMITH
v.
MULCAHY.

The owners of certain tithe rent-charge applied to the county court under s. 2 of the Tithe Act, 1891, for the recovery of arrears due from F. S., J. H., and W. B. S. The county court made orders accordingly and appointed J., an officer of the court, to distrain. J. gave to F. S., J. H., and W. B. S. respectively ten days' notice in writing of his intention to distrain, as required by s. 81 of the Tithe Act, 1836. He took no further steps, and eight months later the county court, on the application of the tithe owners, appointed M., an officer of the court, to distrain in place of J. M. served no further notices but seized in the case of F. S. 10 ewes, 19 lambs and 5 tegs; in the case of J. H. 5 cows and 1 horse, which was at the time of the seizure in use drawing a cart; in the case of W. B. S., 43 sheep, 1 cow, 1 heifer and 1 cart horse (in actual use), of which W. B. S. was a bailee, but not the owner.

Actions of replevin by F. S., J. H., and W. B. S., respectively against M. were removed by certiorari into the High Court.

The plaintiffs contended that the distress was illegal (1.) because M. had not served ten days' notice of his intention to distrain; (2.) because by the statute 51 Hen. 3, stat. 4, known as Les Estatuz del Eschekere "beasts which gain the land and sheep" are privileged from distress if other distress is available, which they asserted was the case on the facts; (3.) because, in the cases of J. H. and W. B. S., the horses seized were in actual use. (This point was conceded by the defendant, subject, in the case of W. B. S. to the question whether a bailee was entitled to maintain an action of replevin.)

The defendant relied on the notices given by J., and contended that no further notices were necessary. He did not admit the existence of the statute cited as 51 Hen. 3, stat. 4, or as Les Estatuz del Eschekere, and said that its true construction (if it existed) was not that contended for by the plaintiffs, and that it had no application to the cases before the Court:—

*Held*, (1.) that the purpose of the ten days' notice of intention to distrain being merely to give the tithe-payer an opportunity to pay and avoid the inconvenience of a distress, that purpose had been fulfilled by J.'s notice, and no further notice by M. was necessary.

(2.) that whether or not the so-called statute 51 Hen. 3, stat. 4, known as Les Estatuz del Eschekere was a statute properly so called or not, it had for centuries been treated as a declaration of the common law binding on the Courts.

(3.) that the true meaning of "bestes ke gaignent sa terre" was "beasts of the plough" which, with sheep, were privileged from distress, in those cases to which the statute applied, if other distress was available.

(4.) that the applicability of the statute depended on whether the right of distress for tithe rent-charge was in the nature of execution like a distress for poor rates, or was subject to the same limitations as a landlord's distress for rent. On the true construction of s. 81 of the Tithe Act, 1836, the words "otherwise to act and demean himself in relation thereto as any landlord may" refer only to the last of the three branches "to distrain," "to dispose of the distress," and "and other, wise to act and demean himself" and do not limit the distress itself-which is analogous to an execution. The ancient statute therefore does not apply to a distress for tithe rent-charge.

Dicta of Lord Mansfield in *Hutchins* v. *Chambers* (1758) 1 Burr. 579 at pp. 587–8 applied.

(5.) In the case of W. B. S., that a bailee may maintain replevin. *Templeman* v. *Case* (1711) 10 Mod. Rep. 24 not followed.

ACTIONS of replevin tried by MacKinnon J.

On March 26, 1932, notice was given on behalf of Queen Anne's Bounty to the Ashford County Court of Kent of an application for the recovery of 11*l*. 7*s*. 10*d*. due to the applicants for arrears of tithe rent-charge from Frank Swaffer, of West Hawk Farm, Kingsnorth, Ashford, and for the appointment of an officer of the Court to distrain therefor under s. 2 of the Tithe Act, 1891, which amended the procedure under the Tithe Act, 1836. (1)

On March 30, 1932, notice was duly given to Mr. Swaffer of that application. On May 5, 1932, the county court made an order for the recovery of 11*l*. 7*s*. 10*d*. and 7*s*. 6*d*. costs, and appointed Mr. A. H. Joy, an officer of the court, to distrain therefor. On July 7, 1932, Mr. Joy served on Mr. Swaffer, in accordance with s. 81 of the Act of 1836, a notice of his intention to distrain on or after July 19.

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(1) The Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 81: "And be it enacted, that in case the said rent-charge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days notice in writing at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years; provided that not more than two years arrears shall at any time be recoverable by distress."

The Tithe Act, 1891 (54 Vict. c. 8), s. 2, sub-s. 1: "Where any sum due on account of tithe rentcharge issuing out of any lands is in arrear for not less than three months, the person entitled to such sum may, whatever is the amount, apply to the county court of the district in which the lands or any part thereof are situate, and the county court, after such service on the owner of the lands as may be prescribed, and after hearing such owner if he appears and desires to be heard, may order that the said sum, or such part thereof as appears to the court to be due, be, together with the costs, recovered in manner provided by this Act, and tithe rent-charge as defined by this Act shall not be recovered in any other manner.

Sub-s. 2: Where it is shown to the court that the lands are occupied by the owner thereof, the order shall be executed by the appointment by the court of an officer who, subject to the direction of the court, shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rent-charge for the recovery of arrears of tithe rentcharge and no greater or other powers. . . ."

No further proceedings, however, were taken upon that notice, and on April 3, 1933, at the instance of Queen Anne's Bounty, the county court made a further order appointing Mr. Jeremiah Mulcahy, a certified bailiff, the defendant in the present actions, an officer of the court, to distrain for the arrears of tithe rent-charge. No further notice was served by Mr. Mulcahy, who on May 8, 1933, entered on Mr. Swaffer's land and seized 10 ewes, 19 lambs and 5 tegs. On May 11 Mr. Swaffer gave notice that he intended to replevy the distress, and on May 13 he duly entered into a replevin bond with sureties. On June 8, 1933, the action of replevin was started in the county court, and particulars of claim were delivered. On June 23, on the application of the defendant under s. 137 of the County Courts Act, 1888 (1), the action was removed into the High Court by writ of certiorari.

By his statement of claim the plaintiff alleged that the distress on May 8 was wrongful and illegal in that the sheep were privileged from distress under the statute 51 Hen. 3, stat. 4, known as Les Estatuz del Eschekere : Districciones Scaccarii (temp. incert.) (2) in that other sufficient distress was available,

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(1) The County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 137 : "Any action of replevin brought in the court shall be removed into the High Court by writ of certiorari, if the defendant shall apply to the High Court or to a Judge thereof for such writ. . . . ."

(2) The text of this document varies in different authorities, especially in spelling. In this case the Court used a certified extract supplied by the Public Record Office from the *Miscellaneous Books* (*Exchequer, King's Remembrancer*), Series I., vol. 9 (formerly known as *Liber Scaccarii X.*).

The following are the material extracts :

"Capitula districcionum Scaccarii . . . .

iiij. Quod nullus distringatur pro debito Regis vel ex alia causa per animalia de caruca vel per bidentes scilicet dummodo habeat alia catalla per quæ sufficienter distringi possit . . . .

Les Estatuz del Eschekere.

Le Rey velt.

Districciones de Scaccario.

. . . . . . .

Unkore est parveu ke nul homme de religion ne autre ne seit destreint par ces bestes ke gaignent sa terre in the form of farm and garden implements, on land out of which the tithe rent-charge payable to Queen Anne's Bounty issued. He alleged further that the distress on the ewes and tegs was unlawful in that before the Tithe Act, 1836, tithe of ewes and tegs could not have been claimed, and accordingly ewes and tegs could not lawfully be distrained upon under the Tithe Act, 1836, and the Tithe Act, 1891, for arrears of tithe rent-charge. He further alleged that the distress was wrongful and illegal in that ten days' notice in writing as required by the Tithe Act, 1836, s. 81, was not at any material time given to the plaintiff. He claimed a declaration that the distress was illegal and the cancellation of his replevin bond.

The defendant admitted the levying of the distress. He did not admit that there was or were in force any statute or statutes which could properly be cited as 51 Hen. 3, stat. 4, or as Les Estatuz del Eschekere: Districciones Scaccarii (temp. incert.). Alternatively he denied that any such statute had any application to the matters in issue in the action. He denied that he found on the premises any other sufficient distress. He denied also that tithe of ewes and tegs could not have been claimed before the Tithe Act, 1836, and submitted that that

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ne par ces berbiz por la dette le Rei ne por la dette dautri, ne par autre encheson ne par les baillifs le Rey ne par autre home taunt com lem treove autre destresce e autre chateus soffisaunz dunt lever la dette ou ke soffise a la demaunde hors pris enparkement de bestes kaunt hom les trove fesauns damage ke hom enparker solum ley e usage de la terre. . . . ."

The following is the translation made and sworn to by Prof. Plucknett and used by the Court:

"The Chapters of the Distresses of the Exchequer:—. . . .

(4) That none be distrained for the King's debt or for any other reason by the animals of his plough or by his sheep, that is to say, as long as he has other chattels whereby he can be sufficiently distrained. . . . .

The Statutes of The Exchequer.
The King wills.
Distresses of the Exchequer.

. . . . . . .

It is further provided that no man of religion nor other shall be distrained by his beasts which [cultivate] his land nor by his sheep for the King's debt nor for that of another, nor for any other reason, neither by the King's bailiffs nor by any other man, so long as one finds other distress and other chattels sufficient for levying the debt or which suffice for the demand; except the imparkment of beasts when one finds them damage feasant which one imparks according to the law and usage of the land."

The meaning of the word "gaignent" translated "cultivate" was one of the disputed points in the case.

question of law was irrelevant to any matters in issue. He denied that ten days' notice of distress was required, and further contended that if it was in fact required it was given (by Mr. Joy).

The facts in the second action of *Hooker* v. *Mulcahy* were similar. The proceedings in the county court were identical and the distress was levied on the same date on Mr. John Hooker, of Honeychild Farm, St. Mary's, New Romney. The arrears were larger, being 55*l.* 10*s.* 8*d.*, and the animals seized included five cows and one horse. In addition to all the points taken in *Swaffer* v. *Mulcahy* the additional point was taken by the plaintiff that the distress of these animals was wrongful on the ground that they were actually in use, the horse in a cart, and the cows being tied up for the purpose of being milked. The defendant, in addition to all the defences raised in Swaffer's case, admitted that the distress of the horse was wrongful but denied that the cows were or could be in actual use, or that the distress was wrongful so far as they were concerned.

The plaintiff in the third action of *Smith* v. *Mulcahy* was Mr. William Blacklocks Smith, of Caldecott Farm, Lydd. The facts were again similar and all the contentions and defences raised in the other two cases were raised in this case also. The distress was levied for 58*l.* 4*s.*, and in addition to 43 sheep and 2 cows a horse was seized which was in actual use. In this case the defendant contended that as the horse was not the property of the plaintiff, who was a bailee of it, he had no right of complaint in respect of it, and could not replevy it.

With regard to the existence of sufficient alternative distress, in Hooker's case the defendant, in answer to a notice to admit, admitted the existence of sufficient alternative distress. In the other two cases evidence was called on this point, and the Judge's findings in each case will be found in his judgment. The defendant contended that owing to the hostility which existed at this date in various parts of the country, and especially in Kent, to the collection of tithe rent-charge, chattels which might intrinsically be of sufficient value to satisfy the distress, would in fact be unsaleable, or would realize only nominal and contemptuous prices, and were, therefore, in the circumstances not sufficient alternative distress.

The text of the statute 51 Hen. 3, stat. 4, known as Les Estatuz del Eschekere was produced by an official from the Public Record Office in the book formerly known as Liber Scaccarii X., and now as Miscellaneous Books (Exchequer, King's Remembrancer), Series I., vol. 9.

Expert evidence was given for the plaintiffs by Professor T. F. T. Plucknett, Professor of Legal History in the University of London, who stated that in the thirteenth century statutes were enacted in a very casual way—the King's Council decided on points, and notified the King. The book produced was a solemn and careful collection of statutes, undoubtedly for purposes of reference. From the writing, it was compiled very near the year 1300; 64 leaves, including the one in question, related to Edward I. All the documents before and after it in the book appeared to be statutes.

The fact that it did not appear on the Statute Roll was quite immaterial. Neither Magna Carta nor the Statute of Westminster the First was on the Statute Roll.

As to the date, it had been put by other authorities at 1275, and he had gone over the ground himself. He had seen no MS. copy earlier in date than the one produced, which had always been in the King's Remembrancer's Office. The introduction was obviously later, in a hand of the thirty-first year of Edward III.

He thought the best word to translate "gaignent" was "cultivate"—it meant to exploit the land generally. It was not used for any particular agricultural operation, but for all the ordinary work done on the land. The translators of the statute—the earliest translation being probably in 1557—simply transliterated the word. The Latin words "averia carucae" which were found in writings almost contemporaneous with the statute seemed to be the equivalent of "bestes ke gaignent sa terre," though no Latin word represented "gaigner."

With regard to the claim in Hooker's case, cows were certainly put into the plough in the thirteenth century.

In cross-examination, Professor Plucknett said that he did not know whether all the statutes named in the Schedule to the Statute Law Revision Act, 1863, were statutes proper. They were so regarded contemporaneously, but not every pronouncement of the King was a statute.

In the copy produced the statute was interpolated—in the sense that five or six chapters, of which this was one, were written out of their proper place. It was a mistake of copying, not an interpolation at a later date. He based his opinion as to the date on the heading to the last statute in the book. It was headed " Great Statutes " whereas very soon after its date 1285 it became known as the Statute of Westminster the Second. It was so cited in the Year Books of 1292, and no other form of citation was found afterwards.

The Articuli super Cartas of Edward 1. (1300), c. XII., was a confirmation such as was constantly being made. The text of that in Ruffhead's edition reads " From henceforth the King will, that such distresses as are to be taken for his debts shall not be made upon beasts of the plough, so long as a man may find any other, upon the same pain that is elsewhere ordained by statute." That related only to Crown debts, and it might be that the Crown was abolishing the privilege as to sheep in respect of such debts, or a mere mistake. The phrase " beasts of the plough " (bestes des carues) in the Articuli super Cartas was derived from the Latin form of a writ already current.

The King, without a statute, could not have given these instructions to the Court of Exchequer. Considerable weight in such matters must be attached to contemporanea expositio, and the contemporary Courts might be assumed to know most about the matter. There were quite a number of cases in which this document had been treated as a statute, and none in which the slightest doubt had been cast upon it.

*Pritt K.C.*, *Ashton W. Roskill*, and *Miss H. M. Cross* for the plaintiff in each case. First, as to the points which are common to the three cases. The necessity for ten days' notice of distress depends on s. 81 of the Tithe Act, 1836, read with s. 2, sub-ss. 1 and 2, of the Tithe Act, 1891. It has been decided in *New College, Oxford* v. *Davison* (1) by Swift J. that the fact that the distress under the Act of 1891 is made by an officer of the Court has not done away with the necessity for the notice. That was obiter, but it was followed by the Divisional Court in *Queen Anne's Bounty* v. *Thorne* (2), where it was necessary to the decision. This has now given judicial authority to the view expressed by Leach on the Tithe Acts (6th ed., pp. 32, 153, Intro., pp. 46–7). Here no notice was ever given by Mulcahy, and the notice by Joy was a notice that *he* intended to distrain. There is no evidence that Mulcahy ever knew Joy had given notice, nor is it pleaded that such notice could enure to the benefit of Mulcahy ten months later.

The point raised in the statement of claim that the ewes and tegs were not distrainable because they would not have been tithable is not open to us in the Court of first instance, since *Queen Anne's Bounty* v. *Thorne.* (2) We take it formally to preserve our right to rely on it in a higher Court, but do not argue it.

The interesting and important point is as to the ancient statute referred to in the pleadings, and the argument falls under three heads: (1.) Does the statute cited as 51 Hen. 3, stat. 4, or as Les Estatuz del Eschekere: Districciones Scaccarii exist? (2.) If so, what is its meaning and true construction? (3.) If those two questions are answered as the plaintiff submits that they should be answered, is that statute applicable to the present cases?

As to the uncertainty of the meaning of the term "statute" in early times, see Plucknett, Statutes and their Interpretation in the first half of the Fourteenth Century, Introduction, pp. 1–2. Documents called "statutes" were of many forms resulting from varied origins: Plucknett, pp. 8–10. From the evidence of Professor Plucknett it appears that the absence of these statutes from the Statute Roll is far from conclusive.

(1) (1933) 49 Times L. R. 579.

(2) [1934] 1 K. B. 297.

Even if the document known as 51 Hen. 3, stat. 4, is not a statute it has long been recognized as declaratory of the common law: see especially *Keen* v. *Priest* (1), per Watson B.

As to the meaning of "bestes ke gaignent sa terre," "gain" must be used in the sense of "bring gain to." That may well be wider than "beasts of the plough," and include beasts which manure the land or even which graze on it: see the argument in *Keen* v. *Priest.* (1) There is authority at all events that sheep are not distrainable if there is any other distress available, and that doctrine has been based on the Statute of Henry III. (See as to this whole question *St. John* v. *Mortimer* (2); *de Ry* v. *Goldington* (3); *Potton* v. *Brun* (4); *Mount* v. *Anon* (5); *Abbot of Battle* v. *Bishop of Chichester* (6); *Dawson* v. *Alford* (7); *Horthbury* v. *Levingham* (8); *Hutchins* v. *Chambers* (9); *Jenner* v. *Yolland* (10); *Keen* v. *Priest* (11); *McCreagh* v. *Cox & Ford* (12)) Text-book authority is to the same effect: see, for example, Fleta, Bk. II., c. 48, where he says: "Et sciend' quod pro communi utilitate regni inhibitum fuit ne quis distringeret alium per oves suas, vel per averia carucarum suarum, quamdiu alia sufficiens districtio inveniri possit"; Fitzherbert's New Natura Brevium, 90 B; Bullen and Leake, 3rd ed., p. 317; Bullen on Distress, 2nd ed. (1899), pp. 119, 233–4, which refers also to the Articuli super Cartas of 28 Edw. I.; Foà, Landlord and Tenant, 6th ed. (1924), pp. 570–1; Woodfall, Landlord and Tenant, 23rd ed. (1934), p. 585, where the statute is said to be in affirmation of the common law.

It is submitted that where there is other distress sufficient to cover part of the debt, that other distress must be taken pro tanto before goods subject to qualified privilege are seized.

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(1) (1859) 4 H. & N. 236, 238.

(2) (1284) Select Cases on the Law Merchant, Vol. II.: Selden Soc., vol. 46 (1929), pp. 40-41.

(3) (1285) Select Cases in the Exchequer of Pleas: Selden Soc., vol. 48 (1931), p. 108.

(4) (1311) Y. B. 5 Ed. II.: Selden Soc., vol. 31 (1915), p. 18.

(5) (1330) Y. B. 4 Ed. III., Hil. 1.

(6) (1355) Y. B. 29 Ed. III., Hil. 16.

(7) (1572) 3 Dyer, 312a.

(8) (1667) 1 Siderfin, 348.

(9) 1 Burr. 579.

(10) (1818) 6 Price, 3.

(11) 4 H. & N. 236.

(12) (1923) 92 L. J. (K. B.) 855.

1933

SWAFFER
v.
MULCAHY.
HOOKER
v.
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v.
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As to the applicability of 51 Hen. 3, stat. 4, the true effect of s. 81 of the Tithe Act, 1836, is to assimilate the position of the tithe owner levying distress in all respects to that of a landlord levying distress. The landlord being prohibited from distraining sheep if there is any other distress, so also is the tithe owner.

*Sir William Jowitt K.C.* and *Rewcastle* for the defendants. We formally take the point that no notice to distrain is necessary at all under the Tithe Act, 1891, but do not argue it in view of the decisions in *New College, Oxford* v. *Davison* (1) and *Queen Anne's Bounty* v. *Thorne.* (2)

But it is submitted that notice having been once given by an officer of the Court, it is unnecessary for every officer of the Court subsequently appointed to give notice. The purpose of the notice being to afford the tithe payer an opportunity to pay what is due and so avoid the inconvenience of distress, that purpose is achieved by one notice, and it would be redundant to repeat it.

It is said by the plaintiff that the distress was illegal because goods were seized which were privileged sub modo. That depends on the existence, construction and applicability of the statute 51 Hen. 3, c. 4.

To deal first with applicability. Assuming the existence and construction of these statutes in the plaintiff's favour it is submitted that they do not apply to a distress for tithe rent-charge. It is important to consider the precise wording of the power to distrain under s. 81 of the Tithe Act, 1836: "it shall be lawful . . . . to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years." The whole question turns on the word "otherwise." As a matter of construction it is impossible to ignore that word. It is wrong to construe the section as though the third limb cut down the rights given by the first two limbs. The meaning of "otherwise"

(1) 49 Times L. R. 579.
(2) [1934] 1 K. B. 297.

is "in other respects." In no standard dictionary is there any authority for interpreting it as meaning "in these and other respects." It has been judicially considered in many cases, but in most of them the learning has been devoted to the question whether the ejusdem generis rule applies (see Stroud's Judicial Dictionary s.v., and per Pollock B. in *Monck* v. *Hilton* (1), and the definitions of "otherwise" in the Oxford English Dictionary). By treating the word "otherwise" in that way one obtains a perfectly sensible construction of the section, because in addition to the seizure and disposal of the distress there remain a number of matters, such as appraisal, the duty to feed beasts, and so forth to which the third limb is applicable.

Historically, there seems no reason why the levy and disposal of a distress for tithe rent-charge should be assimilated to the landlord's right of distress for rent. Originally tithe was enforced by a decree of the Ecclesiastical Courts, to which the Civil Courts gave effect by imprisonment of the defaulter.

Next came the Act of 1549 (2 & 3 Edw. 6, c. 13), which gave to the owner treble value in an action on the statute. The tithe owner had also a remedy in the Court of Chancery, which acted in a manner somewhat similar to that of the Ecclesiastical Court.

For the recovery of small tithes there was the Small Tithes Act of William & Mary (7 & 8 Will. 3, c. 6) giving a remedy before justices. That Act was made perpetual by the 3 & 4 Anne, c. 18, s. 1. The matter was entirely recast by the Act of 1836. Under that Act there is no personal debt: see s. 67. It is not, strictly speaking, correct to talk of a person "owing" tithe rent-charge. It is a charge on the land.

In those circumstances one would expect to find the same freedom from the limitations of a landlord's right as are found in the cases of distress under the Poor Relief Act, 1601 (43 Eliz. c. 2). In *Hutchins* v. *Chambers* (2) Lord Mansfield held that a distress for poor rates was more analogous to an execution than to a distress for rent, and that therefore beasts of the plough might be distrained though there was

(1) (1877) 2 Ex. D. 268, 278–9.

(2) 1 Burr. 579.

other sufficient distress. It is submitted that the same considerations would apply to distress for tithe rent-charge.

[MACKINNON J. If you are right, replevin is not applicable.]

It is, in our submission, quite misconceived. *Hutchins* v. *Chambers* (1) shows that where one finds a new right of distress created by statute it is prima facie not subject to the limitations of the landlord's right. One has to see whether that right is cut down by the statute. As a mere matter of English grammar, the necessity of mentioning the landlord in the section is not to affect the right of seizure but to deal with the subsidiary matters such as impounding, and feeding of livestock. This matter is discussed in *Newnham* v. *Bever*. (2)

The so-called Statute of Henry 3 was merely declaratory of the common law. In early days pleadings must be fitted to a writ, and the form of writ set out in Fitzherbert's New Natura Brevium, 9th ed., vol. 1, [90] B, is inconsistent with the statute, for it implies that beasts of the plough were protected only if there were no other *beasts* sufficient. The writ there is inconsistent both with the statute and with the Articuli super Cartas. None of the cases in which this document is referred to involve the conclusion that it was a statute. In *Hutchins* v. *Chambers* (1) the statute is mentioned in the report but Lord Mansfield does not base his judgment upon it.

[Reference was made also to *Dawson* v. *Alford* (3); *Horthbury* v. *Levingham* (4); *Jenner* v. *Yolland* (5); *Keen* v. *Priest* (6); *McCreagh* v. *Cox & Ford*. (7)]

As to the construction of the statute, if statute it be, the first question is whether the privilege is "subject to other distress (of whatever kind) being available," or "subject to other *beasts* being available." In either case, unless the other distress is sufficient for the whole amount, the privilege does not arise. There is no rule that if there is other distress sufficient to cover part only of the levy it must be exhausted before the privileged goods can be resorted to. As a matter of policy, nothing could be more inconvenient than to force the tithe owner to take the goods of the farm-house.

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(1) 1 Burr. 579.
(2) (1849) 8 C. B. 560.
(3) 3 Dyer, 312a.
(4) 1 Sid. 348.
(5) 6 Price, 3.
(6) 4 H. & N. 236.
(7) 92 L. J. (K. B.) 855.

With regard to Hooker's case it is not disputed that the horse which was in actual use ought not to have been seized. In Smith's case the position is different, for the plaintiff was only a bailee of the horse. *Templeman* v. *Case* (1) is direct authority that a bailee cannot maintain replevin. Bullen on Distress, 2nd ed., p. 278, states the contrary, but without referring to *Templeman* v. *Case.* (1) *Fell* v. *Whittaker* (2) was not replevin, but excessive distress. A bailee may maintain his action for that, as he may for trespass or case.

*Pritt K.C.* in reply. First with regard to the ten days' notice, it is worth observing the terms of the notice given by Mr. Joy. It was in these words : " Dear Sir, I have been appointed by the Court to distrain upon your lands for tithe rent charge in arrear. Be pleased to take notice that I intend to levy distress on or after July 19, 1932." Let it be assumed that Mr. Joy was not bound to distrain in person, still no one could possibly say that Mr. Mulcahy was distraining as the servant or agent of Mr. Joy, nor could it be argued that he was the servant or agent of the court, for the court had not given the notice. Mr. Mulcahy did not distrain after ten days' notice in writing, for the only notice did not say that he would distrain, but that Mr. Joy would. If the notice once given is held sufficient, great difficulty might arise in case the land were sold before the distress was levied.

With regard to the applicability of the Statute of Henry 3, s. 81 of the Tithe Act, 1836, is all one sentence. The defendant is seeking to read it as though it was " to distrain upon the said lands . . . . not as a landlord, and to dispose of the distress when taken, not as a landlord, and otherwise to act and demean himself as any landlord may." But the right to distrain by itself never connoted a right to sell, and if the defendant's argument is right no right to sell is conferred here. The tithe owner's rights had always been much less than those of landlords : to say without express words that a tenant (who might not be the person owing the tithe) should be exposed not only to the full rigours of a distraining landlord but to much greater rigours would be very extraordinary. The proviso to s. 81 is only intelligible on the basis that it applies to the whole section and not only to the third limb.

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(1) 10 Mod. Rep. 24.

(2) (1871) L. R. 7 Q. B. 120.

If the purpose of the Act is considered, to give a short, simple remedy to the tithe owner, similar to that possessed by a landlord, is comprehensible. But it is not comprehensible that persons who had hitherto had much smaller rights than landlords should suddenly be given much larger rights.

There is a contrast rather than an analogy between the 43 Eliz. c. 2 and this Act. The Act of Elizabeth has nothing to do with land, and is concerned with a personal liability; under the Tithe Acts the liability is a charge on the land with no personal debt. *Newnham* v. *Bever* (1) is in our favour on this point.

The punctuation of a statute is to be ignored, except that in Acts printed after 1850 it may be given some weight as contemporanea expositio: see Hardcastle on Statutory Law, 3rd ed., pp. 206–7, and per Cockburn C.J. in *Stephenson* v. *Taylor*. (2)

As to the construction of the Act, it would seem from Fleta, Bk. II., c. 48 (ed. 1647, p. 103), that the true construction was that sheep and beasts of the plough were privileged if there was any other distress. It is true that the effect of the privilege is not to prescribe the order of sale, but it does prescribe the order of seizure. The burden of proof is on the distraining landlord to show no other distress: see Bullen on Distress, 2nd ed., p. 235; Foà on Landlord and Tenant, 6th ed., p. 570; *Dawson* v. *Alford* (3); *Gonsky* v. *Durrell* (4), though Scrutton L.J. dissented in the latter case.

As to the position of the bailee in Smith's case, replevin being merely a simpler remedy in case of wrongful distress there is no reason why it should not be open to a bailee.

(1) 8 C. B. 560.
(2) (1861) 1 B. & S. 95, 101, 106.
(3) 3 Dyer, 312a.
(4) [1918] 1 K. B. 104, 106; and in C. A. [1918] 2 K. B. 71.

Rolle's Abridgment (1668), Tit. Replevin, p. 430, is clearly in my favour: Brooke's Abridgment, Folio ed. 1573, Part II, p. 208, Tit. Replevin, No. 29, reports a decision in my favour with a note. *Templeman* v. *Case* (1) is the only authority to the contrary and should be treated as wrong.

MacKinnon J. In the case of *Swaffer* v. *Mulcahy* the plaintiff in the year 1918 bought some land in Kent. That land, ever since 1836, if not before, had been subject to a rent-charge. The plaintiff, of course, bought with full knowledge of that, and he must have paid a proportionately lower price for the land than he would have paid if it had been free of any such burden. The amount of the rent-charge was 11*l.* 7*s.* 10*d.* per year. So far as I know, he paid that sum from 1918 onwards, but in 1931 he was apparently minded to relieve the land of this burden and appropriate to himself its full value, not by the method, which was available, of redemption, but by merely abstaining from paying and then by the exercise of every conceivable means putting obstacles in the way of the owner of the tithe enforcing his charge upon the land. These proceedings are one act in the drama, whether it be tragedy or comedy, that has ensued. The annual tithe had been paid generally on April 1 and on October 1 in two equal moieties. Two instalments having been left unpaid, the persons entitled to the rent-charge proceeded to take steps to enforce their rights. The means open to them existed under "an Act to make better provision for the recovery of tithe rentcharge" of 1891. Sect. 2 of the Tithe Act, 1891, provides that the tithe rent-charge shall be recoverable through the county court. Sub-s. 1 of that section provides that application may be made to the Court, which after hearing the owner of the land subject to the charge "may order that the said sum, or such part thereof as appears to the court to be due, be, together with the costs, recovered in manner provided by this Act, and tithe rentcharge as defined by this Act shall not be recovered in any other manner." In pursuance of that section, proceedings were taken in the county court and it was adjudged that the plaintiff in this action was liable to pay 11*l*. 7*s*. 10*d*., together with 7*s*. 6*d*. costs. For the recovery of that sum machinery is provided by sub-s. 2 of s. 2 of the Act of 1891: "Where it is shown to the court that the lands are occupied by the owner thereof, the order shall be executed by the appointment by the court of an officer who, subject to the direction of the Court, shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rentcharge for the recovery of arrears of tithe rentcharge, and no greater or other powers." That necessitates a reference to s. 81 of the Tithe Act of 1836. [His Lordship read it.]

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(1) 10 Mod. Rep. 24.

The county court being required by the section of the Act of 1891 to appoint an officer, the county court at Ashford made an order on May 5, 1932: "It is this day ordered that the sum of eleven pounds seven shillings and tenpence be recovered together with costs in respect of tithe rent charge issuing out of the lands described in the first part of the schedule to this order, due for the period of one year, and for the purpose of such recovery Mr. A. H. Joy, an officer appointed by this Court, shall distrain upon those lands which are liable to be distrained on under s. 85 of the Tithe Act, 1836, for the said sum together with seven shillings and sixpence for costs and also the costs of the distress, and that for the making of such distress this order shall be such officer's warrant." Mr. Joy, having been so appointed, on July 7, 1932, sent this notice to the plaintiff, Mr. Swaffer: "Dear Sir, I have been appointed by the Court to distrain upon your lands for tithe rent charge in arrear. Be pleased to take notice that I intend to levy distress on or after July 19, 1932. Yours faithfully, A. H. Joy." That was the ten days' notice which is referred to in s. 81 of the Act of 1836. For some reason, of which I have not had any explanation, Mr. Joy did not in fact go to the plaintiff's farm, or take any steps in pursuance of his appointment and of that notice. On April 3, 1933, an application was made to the county court ex parte by the owners of the tithe

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for an order that Mr. Mulcahy be substituted for Mr. Joy as the officer appointed by the Court. The application was made in four cases, including that of the plaintiff, and an order was made appointing Mr. Mulcahy, the present defendant, as officer of the Court in place of Mr. Joy, the Court making this direction when making the order: "Order made on assurance that Queen Anne's Bounty will prosecute any person interfering with the officer in the execution of his duties."

That the Court exacted that stipulation may be some explanation of the reason why Mr. Joy had not hitherto taken any action under his appointment.

Mr. Mulcahy, on May 8, 1933, went to the farm of the plaintiff and seized by way of distress certain things. He had furnished himself with a document which I think he produced to Mr. Swaffer, in the form usually issued by certified bailiffs when executing a distress on behalf of a landlord. No point turns on that, and if in the place of "the landlord" there had been submitted the words "owners of the rent-charge," it would probably have been perfectly in order. Mr. Mulcahy, the defendant, having arrived on the land, seized 10 ewes, 19 lambs, and 5 tegs, the property of the plaintiff. The plaintiff executed a bond by way of replevin. The animals were released to him and he started his action as plaintiff in the county court in the suit of replevin against Mr. Mulcahy as the defendant. That action was removed by certiorari from the county court to this Court, and I have now heard it.

In the pleadings, four points are raised, three of which I have to consider. The first point raised in the order in which they are set out in the pleadings is that this distress was wrongful by reason of the existence of a statute of 51 Henry 3, or a statute, of uncertain date called the Statute of the Exchequer, because there were other sufficient articles upon the premises which could have been taken, and by virtue of that statute it was illegal to take sheep if these other sufficient things existed.

The second point taken is that it is illegal to take sheep because they were not creatures subject to tithe before the

Tithe Act, 1836, and that the owners of the rent-charge, pursuant to their power of distress can only execute that distress upon things or chattels that previously to the Act of 1836 had been titheable in kind. The third point taken is that the distress was irregular in that, although Joy had given his ten days' notice, Mulcahy, who had been substituted for Joy, did not give any ten days' notice. The fourth point is a question of fact which arises under the first point I have mentioned, namely, whether other articles upon the farm, were, in fact, of sufficient value to satisfy this claim for 11*l*. odd or not. Those are the points which are raised in the order in which they are set out in the statement of claim. I propose to deal with them not quite in the same order.

I think there is nothing in the third point raised, namely, that this distress was illegal because the ten days' notice had not been given a second time. The question has arisen in an earlier case, whether, under the procedure laid down by the Tithe Act of 1891, it is necessary for the officer appointed by the Court to give ten days' notice under s. 81 of the Act of 1836 at all. That has not been argued before me because it has already been decided by Swift J. in *New College, Oxford* v. *Davison*. (1) Sir William Jowitt intimated that he desired to keep that point open, and I understand that case is now the subject of appeal.

It seems to me that the whole purpose of the ten days' notice and its obvious purpose, is to give the owner of land which is the subject of the rent-charge an opportunity of paying the money and thereby avoiding the inconvenience of having a distress upon his land. Mr. Joy having given the ten days' notice, the plaintiff in this case was given ample opportunity of paying this 11*l*. before the expiration of the ten days. As a mere matter of machinery, the Court substituted one officer for another. In this case, as it appears, the Court did so at the instance of the plaintiff in the action, but it might have been because Mr. Joy had fallen ill, or indeed had died. Moreover, I do not think that it was necessary for Mr. Joy to come personally. He might be there, but he might

(1) 49 Times L. R. 579.

be assisted by others, and I think that he could act probably through a certified bailiff. Whether that be so or not, as the ten days' notice was given to the plaintiff and he had thereby secured to him that which I think was the purpose of the Act of 1836, namely, the opportunity of paying before the expiration of the ten days, I think that there was no necessity at all for a second ten days' notice to be given to him when Mr. Joy ceased to be the appointed officer and another one was substituted for him.

The second point raised in the pleadings Mr. Pritt has not sought to argue, because that also has been decided by Swift and du Parcq JJ. in *Queen Anne's Bounty* v. *Thorne* (1), and I need say nothing about it. Again, I understand that point is saved by Mr. Pritt in view of a possible appeal.

I come now to the main question, whether this distress was wrongful because the things which were seized were sheep. It is said to be wrongful by reason of the provisions of the ancient statute or statutes. The defence does not admit that there is or are in force any statute or statutes that can properly be cited as 51 Henry 3 or as the Statute of the Exchequer, or alternatively, that any such statute has any application to the matters herein. As to the existence of this statute or these statutes, we had a very interesting antiquarian discussion. The text which is mainly relied upon, is in Norman French. The translation of the material passage which is relied upon is this: "No man of religion, nor other, shall be distrained by his beasts that gain his land, nor by his sheep, for the King's debt, nor the debt of any other man, nor for any other cause, by the King's or other bailiffs, but until they can find another distress, or chattels sufficient whereof they may levy the debt, or that is sufficient for the demand." (2) As I understand, the earliest document in which that appears is an extremely interesting volume which was brought here yesterday from the Record Office and which I looked at with enthusiasm. In that, this supposed statute is written out in the middle of another statute of the Exchequer, which is commonly called 51 Hen. 3, stat. 5. It is not only in the middle of it, but it is in the middle of one section of it, and there appears to be a note by the scribe in that ancient volume to the effect that he has made a mistake and written it out in the wrong place. In Ruffhead's edition of the statutes, this alleged statute is called "The Statute De Districtione Scaccarrii," and a version, different in language or at any rate in spelling, is printed from "Cotton Manuscripts Claudius, D. 2," which is in the British Museum. The evidence of the expert witness who was called about this matter informed me that this statute is not on the statute roll, and that its date, alleged to be 51 Henry 3, is almost certain to be wrong, and he infers that it must have been of the reign of Edward 1. If it were necessary to decide whether this document of this uncertain origin really is a statute, or enforceable as a statute, I should find great difficulty about it, but I do not think that it is necessary to come to any conclusion one way or the other about that. The truth is that it has been referred to over and over again, and effect given to it, throughout the history of the law. It is referred to as early as 1280, in a case in the Year Books. And the Courts have treated it, whether it was a statute or not in the full and technical sense, as being a document declaratory of the common law, the terms of which are binding upon the Court. It is cited in *Keen* v. *Priest* (1), and Watson B., in an interpolation in the argument when that statute was being relied upon, said: "Those statutes are only in affirmance of the common law." I think the truth is that this is a very ancient statement which has been for many centuries accepted by the Courts as declaratory of the common law—namely, that a landlord making distress is not entitled to take sheep.

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(1) [1934] 1 K. B. 297.

(2) This is the translation given in Ruffhead's edition of the statutes.

But the question arises whether the power of distress given by s. 81 of the Tithe Act, 1836, is subject to the rule that such distress cannot include the taking of sheep. It has been argued by Sir William Jowitt that it is not. This is a power of distress which is not distress by a landlord, but is distress by way of execution, and Sir William Jowitt relies upon the decision of Lord Mansfield in the Court of King's Bench in *Hutchins* v. *Chambers* (1), a decision the principle of which was followed by McCardie J. in *McCreagh* v. *Cox & Ford*. (2) Those cases deal with a right of distress given under the Poor Relief Act, 1601. In *Hutchins* v. *Chambers* (1) the distress had been made to recover the amount of the poor rate, and the bailiff took what were said to be beasts of the plough, which were also said to be within the meaning of this ancient statute "bestes ke gaignent sa terre." It was not a simple question of sheep such as arises in this case. Lord Mansfield held that the ancient statute was not applicable to this form of distress. I need not read all of it but the most material passage seems to me to be this: "On the second argument, Mr. Williams not only argued very well as counsel for his client; but he explained the whole learning of distresses at common law; which were a nomine pœnæ, not a satisfaction"—that is to say, on a distress at common law you took the articles only as a pledge and you had no power to sell them—"and as I adopt the reasoning of his argument throughout, to avoid repetition now, I will in a great measure refer to it for the grounds of the opinion which the Court is of.

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(1) 4 H. & N. 236, 238.

"The first question is 'whether averia carucæ may be taken for a distress upon the poor's rate, where there are other distrainable goods sufficient.'

"As to this, the solid distinction is, 'that the seising under the 43 of Elizabeth'"—that is the Act of 1601—"'and such like acts of Parliament, is but partly analogous to the common law distress, (as being replevisable, etc.), but is much more analogous to the common execution;' (like a fieri facias, where the surplus, after sale, shall be returned).

"In the old common law distresses, which were in nature of a nomine pœnæ to compel payments, it would have been absurd to have suffered the implements by which a man gains his livelihood to be holden as a pledge; because that would have been taking from the man, the only means

(1) 1 Burr. 579, 587.

(2) 92 L. J. (K. B.) 855.

he had, of being able to pay the debt. But this reason does not hold, where the things distrained may immediately be sold by way of satisfaction: which, though called a distress, yet really is, in this respect, an execution."

I think that reasoning exactly applies here. And, I think that this is one of those Acts to which Lord Mansfield refers in the phrase, "such like Acts of Parliament." This form of distress given by the statute of 1836 is much more analogous to the method of execution, and, therefore, in my view, the point falls to be decided in the same way as in *Hutchins* v. *Chambers* (1) and in *McCreagh* v. *Cox & Ford* (2), namely, that the rule of law laid down in the ancient document that is called a statute does not apply to this distress under s. 81 of the Act of 1836.

I ought in that respect to mention, because it might otherwise be thought disrespectful, that du Parcq J. appears to have intimated an opinion which would differ from the view which I am now expressing. That was in the course of the hearing of *Queen Anne's Bounty* v. *Thorne* (3), and the point that arose was the one that I have mentioned as having been raised in this case but abandoned, namely, that you could only distrain on things which were the subject matter of tithe in kind. In the course of that case du Parcq J. did intimate—it was necessarily an obiter dictum because the question did not arise directly in the case—that in his view the power of distress given under s. 81 of the Act of 1836 was the same power as that of a landlord and was subject to the same limitations as a landlord's right of distress. Of course, if that had been the point decided in that case, I should not only have felt that I ought to follow it, but I should readily have done so; but, as I say, it was not a point that arose directly in the case, and, therefore, I think that it is my duty to make up my own mind upon this question. I am afraid that my conclusion differs from that of du Parcq J. There does occur in s. 81 the phrase "as any landlord may" following at the end of the sentence, which has three parts.

(1) 1 Burr. 579.

(2) 92 L. J. (K. B.) 855.

(3) [1934] 1 K. B. 297, 316.

du Parcq J. in construing that appears to take the view that those words "as any landlord may" ought to be read as part of and as limiting each of the three preceding parts of the sentence. In my view they apply only to the last part of the sentence. The whole sentence, leaving out immaterial words, is: "It shall be lawful for the person entitled to the same . . . . to distrain upon the lands liable . . . . and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent." du Parcq J. says that he would read that sentence inserting a comma after the word "thereto" so that, written out in full, it would mean that it shall be lawful for the person entitled to the same to distrain as any landlord may and to sell as any landlord may and otherwise to act and demean himself as any landlord may. In my view, that is not the proper construction of the section. There is no comma after "thereto," and its absence, I think, is significant. There is a comma after the word "taken" and before the words "and otherwise to act," but there is no comma after the word "thereto." Moreover, if it had been intended that the words "as any landlord may" were to apply to the two preceding things, the power to distrain and the power to sell, I think that it would have been much more clearly and logically expressed if the reference to the landlord had been inserted at the beginning of the passage; for instance, "it shall be lawful for the person entitled to the same, as any landlord may for arrears of rent to distrain, sell and otherwise to act and demean himself in relation thereto." As the words are enacted, it is not so, and I think that, grammatically and logically, the words "as any landlord may" apply only to the sentence in which they occur—namely, the sentence "and otherwise to act and demean himself in relation thereto."

That being so, I think that the plaintiff fails on the point raised in paragraph 3 of the statement of claim, and that this seizure of sheep was not wrongful and illegal, because it was a seizure authorized by a power of distress given by way of execution rather than by conferring on the claimant merely the powers of a landlord.

That really makes it unnecessary for me to decide the fourth question, the question of fact as to the alternative value of the goods alleged to be upon the farm, because it is only if there were other goods on the farm of sufficient value to satisfy the amount claimed that the prohibition of taking the sheep would arise. As I say, it is not necessary for me to decide that question, but it would perhaps be desirable that I should indicate my opinion about it, and I can do so very shortly. The other things were hay, and various farm and garden implements. Those things are said to be of more value than the 10*l.* or 11*l.* involved, and in one sense they were ; that is to say, if Mr. Swaffer had died, and these goods were being sold by his executors at a sale by auction, no doubt these tons of hay and these various other things would have fetched more than 11*l.* But unhappily, as I gather from the evidence, there has been a good deal of feeling aroused in this neighbourhood over this question of tithe and the enforcement of the rights of the owners of the tithe rent-charges, and I gather from that evidence that it would be quite futile to put things like this up for auction. Derisive bids only would be secured for them in this neighbourhood. Mr. Swaffer himself with regard to that said, with a certain tone of exultation, "I do not think it matters what they try to sell. They will not get anything for it," and his witness Mr. Finn told me that if it had been put up for sale by auction you would probably get a bid of 6*d.* for a farm wagon. Mr. Finn, therefore, agreed that any sale by auction was impossible, but he said that it would be possible to sell the goods by tender, and he said that if that were done he thought one ought to be able to get prices about 30 per cent. less than one would get at an auction where there were no circumstances of public feeling involved. I inferred from the evidence which was given as to auctions that there would be a similar difficulty with regard to obtaining any tenders. The plaintiff, in order to show that tenders were possible, called Mr. Radcliffe, the bursar of New College, and he also called Mr. Brett, the Registrar of the Hythe County Court, under a subpœna, in order that he should produce in evidence four letters written by Mr. Radcliffe in which he made tenders for the purchase of certain goods seized in other cases. I suppose I was invited to infer that Mr. Radcliffe had such a passion for collecting miscellaneous articles in Kent that he or New College would have tendered for these tons of hay and so on if an attempt had been made to sell Mr. Swaffer's goods by tender. But it is quite clear from Mr. Radcliffe's evidence that the action which the College then took was in regard to special cases in which the owner of the tithe rent-charge was Merton College. Being desirous of assisting a brother Bursar of a neighbouring college, he made those tenders. In this case, the owner of the tithe rent-charge is not a college, nor a body in which, for aught I know, Mr. Radcliffe or New College has any interest or with which he or the College has any sympathy, and the fact that in the case in which Merton College was the owner of the tithe rent-charge the Bursar of New College made certain offers to purchase by tender seems to me to have no bearing upon the question whether successful tenders could have been got in this case. The inference that I draw is that they could not.

The result of what I have said is that the various grounds upon which the plaintiff here claims a declaration that the distress was illegal, and the cancellation of the replevin bond, fail, and there must be judgment for the defendant with costs.

The next case is that of *Hooker* v. *Mulcahy*. This is a very similar case. The proceedings in the county court were exactly the same as in Swaffer's case. The amount involved here is greater, it being 55*l*. The chattels seized were different. They consist of five milking cows and one horse, and the horse was pulling a cart at the time when it was seized. It is said that the five milking cows are within the rule of the ancient document, the alleged statute, as being animals "ke gaignent sa terre," or, in the translation in Ruffhead's edition of the Statutes of the Realm, "beasts that gain his land." That is a question of law which did not arise in the other case. As regards that, I can express my view quite shortly. I think that, whatever originally may have been the meaning of animals "ke gaignent sa terre," the uniform decision of the Courts for a good many centuries has treated that as meaning "beasts of the plough." In the old days, they were very likely bullocks as well as horses, but that, I think, is the real meaning of the phrase. There are many cases, and I certainly need not refer to all of them. Perhaps one of the most interesting is as early as 1311. It is a case in the Year Books. (1) The headnote in the translation is: "Replevin founded on the statute respecting beasts of the plough, where the plaintiff said that the defendant took his bullocks, to wit, four; and the defendant said that he took no bullocks of the plough, but four cows," and Bereford C.J., in giving judgment, said: "If the inquest find that he did not take your bullocks of your plough but your four cows, what will you get by your writ ?—*inferring that he would get nothing*—and he has an answer to your counting. There are many folk of the neighbourhood who put cows to the plough for want of bullocks, and if this be your case you could have said 'the beasts of your plough, to wit, cows,' and then your counting would be sufficiently good." I think that great numbers of subsequent cases have attached the same meaning to this same phrase "bestes ke gaignent sa terre." I think that it means "beasts of the plough." There is no averment here (as I may say with Bereford C.J.) by the plaintiff that these cows were beasts of the plough. The plaintiff could have said, "beasts of my plough, to wit, cows." He has not done so, for the obvious reason that, nowadays in this country no bullocks are used for ploughing. It is possible that somewhere in England, bullocks are still used for ploughing, but I am quite certain that near Romney Marsh these five cows have never been in the plough in their lives, and I gather they were, in fact, milking cows. Even if the statute did apply, and I was wrong in holding that it did not, I should have then held that these cows were not privileged from distress because they were not within the statute, or alleged statute, which is relied upon.

There is another point in this case, namely, that the

(1) *Potton* v. *Brun*, Selden Soc., vol. 31, (1915) p. 18.

horse was in actual use. It is an ancient rule of common law that a chattel or a thing which at the moment of its seizure is in actual use is wrongfully seized, the reason suggested in the old cases being that if a man is actually using something, such as a spade or an axe, to seize it by way of distress may provoke him to wrath and cause a breach of the peace. That proposition, however, is admitted by the defendant in this case. He admits that he was wrong in taking the horse.

With regard to the question whether the articles present on that farm, which included 2031 fleeces, were of sufficient value, that again it is not necessary for me to decide, but I may perhaps indicate my view. I think if that did become a point in issue, which it only would if the statute applies, the defendant has admitted, and admitted for all purposes, that those fleeces were of sufficient value. A notice to admit was served, and was answered, and I think the effect is that the defendant is not in a position to say that there was not sufficient value in the other goods upon the farm—namely, the 2031 fleeces.

The result, therefore, of this case is that I think there should be a declaration in favour of the plaintiff that the horse, but only the horse, was wrongfully seized, and perhaps, a declaration that with regard to the horse he is not bound by his replevin bond, although he is as to the other beasts, the cows. As to the costs of the action, I will hear what is submitted to me about that matter. That is Hooker's case.

The case of *Smith* v. *Mulcahy* is exactly similar, except that the amount involved is 58*l*., and the articles seized are rather different. In Smith's case what was seized were 43 sheep, 1 cow, 1 heifer, and 1 white carthorse, and the carthorse was in use. On that statement of facts, it would look as though my decision in Swaffer's case and in Hooker's case would decide this one. In my view, the sheep were properly taken, and the cow and the heifer were properly taken. The white carthorse, being in use, would seem to follow the fate of the carthorse in Hooker's case, but there is a slight difference which arises. In this case the horse did not belong to Mr. Smith, it belonged to the local authority, and it had been lent to Mr. Smith to work on his farm, and recover from lameness. The question arises whether Smith, as a bailee, can make a claim in replevin. Nearly all the books assert that a bailee can claim in replevin, and the only authority to the contrary, although it is a rather remarkable one, is a dictum which has been cited to me by Sir William Jowitt. That is in *Templeman* v. *Case* (1), in the tenth year of Queen Anne. That report says this: "Action upon the case for entering the house and taking the goods of the plaintiff in the said house. The defendant pleads in bar, that he entered in aid of a bailiff who had a writ of execution, and took the goods of another, and not of the plaintiff. The plaintiff demurs." The Court said: "A possessory right is sufficient to maintain an action of trespass or case, though not a replevin." That seems to be quite specific, but, on the other hand, there is a quantity of ancient authority which asserts that a bailee not the owner of the goods, but merely their possessor, may maintain replevin in regard to them. There is a passage which appears to be to that effect in Brooke's Abridgement (folio ed., 1573, p. 208, Tit. Replevin, No. 29), although it is almost illegible and unintelligible, and there is a much clearer passage to the same effect in Rolle's Abridgement (1668, Tit. Replevin, p. 430); and I think that is more in agreement with the general principle that a man who is a bailee, and whose possession of goods is disturbed, may maintain an action in regard to that disturbance of his possession. Therefore, in this case I think Mr. Smith, in regard to the horse, is entitled to a declaration that its seizure was illegal, and a declaration that his replevin bond does not bind him in regard to the horse, although it does bind him in regard to the sheep, the cow and the heifer.

Here again, it is not necessary, in the view I have taken of the case, for me to express any opinion whether the other articles were sufficient in value. Were it necessary for me to come to a decision on that point, my view would be, as regards the haystacks, wagons, dung-carts and so forth, the same as in Swaffer's case, but here there was a quantity of white clover, grass seed in bags, and 20 cwt. of a proprietary cattle food called Kositos. My present view is that those things probably would have been of sufficient alternative value, but, as I say, it is not necessary for me to come to a definite decision about that, because the point does not arise.

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(1) 10 Mod. Rep. 24.

After hearing counsel as to costs, his Lordship continued:

I have listened to these submissions, and I have considered the matter. In regard to Swaffer's case, where the plaintiff has wholly failed, I think there must be judgment for the defendant with costs on the High Court scale here and, of course, on the county court scale below before the removal, and an order for the money in Court to be paid out to the defendant. In the cases of Hooker and Smith, each of them has succeeded in regard to the respective horses. That is a very small part of the whole cause of action and certainly does not involve the very difficult questions of law that were raised and were specially intended to be raised in the litigation. If the claim had been limited to the horse, it certainly would never have emerged from the county court, and if it had been put on the ground that it was actually in use, I think it is highly probable that there would have been no litigation about it at all. In those circumstances, I do not think that that very small measure of success with regard to the horse in each of those cases ought to entitle the plaintiff to any substantial amount of costs. The method which I propose to adopt with regard to it is to give the defendant the costs of the action subject to deduction in respect of that small matter. I think in each of those cases there should be a judgment for the plaintiff for a declaration that the horse was wrongfully seized and that he is not bound by his bond to return it, and a judgment for the defendant as to the rest of the claim, the defendant to have the costs of the action subject to a deduction of 15*l.* in each case, and in these cases also an order for the payment out of the money in Court.

*Judgment accordingly.*

Solicitor for plaintiff in each case: *Edward F. Iwi.*

Solicitors for defendants: *Deacon & Co.*

J. W. H.

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## JOHNSON *v.* LEICESTER CORPORATION.

*Local Government—Housing—Two Houses, each unfit for human habitation—Owner's Undertaking to throw two Houses into one and make it fit for human habitation—Whether Local Authority entitled to refuse to accept Undertaking—Housing Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 39), *s.* 19.

Two back to back dwelling-houses, belonging to one owner, and of a type suitable for occupation by persons of the working classes, were found to be unfit for human habitation and that neither could, by itself, be rendered so fit. The local authority rejected a proposal by the owner to turn the two houses into one, and made a demolition order. On appeal to the county court the judge found that the two houses could be combined into one at a reasonable expense and that the combined house would be suitable for occupation by persons of the working classes, and he accepted an oral offer of the owner to carry out the work:—

*Held*, that there was nothing in s. 19 of the Housing Act, 1930, to prevent the local authority accepting the undertaking of the owner to turn the two houses into one; that the county court judge was entitled to accept the undertaking, which should, however, have been in writing, and further, should have specified the period within which the work should be carried out.

APPEAL from Leicester County Court.

On July 31, 1933, the council of the City of Leicester (hereinafter called "the Council") served two notices on E. C. Johnson (hereinafter called "the owner"), one in respect of each of two dwelling-houses in Leicester, belonging to him, No. 89 and 89½ Archdeacon Lane, stating that the Council was satisfied that each house, which was of a type suitable for occupation by persons of the working classes, was unfit for human habitation and was not capable at a reasonable expense of being rendered so fit, and having accepted no undertaking from the owner with respect to the carrying out of works or the future user of the house, had, in pursuance of s. 19, sub-s. 3, of the Housing Act, 1930 (1), ordered (1.) that each dwelling-house be vacated within twenty-eight days from the date on which the order became operative ; and (2.) that each dwelling-house be demolished within six weeks after the expiration of the last mentioned period, or, if the house was not vacated by that date, within six weeks after the date on which it was vacated.

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(1) Housing Act, 1930, s. 19, sub-s. 1: "Where a local authority, upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any dwelling-house which is occupied, or is of a type suitable for occupation, by persons of the working classes, is unfit for human habitation and is not capable at a reasonable expense of being rendered so fit, they shall serve upon the person having control of the house, upon any other person

Neither house was in a clearance or unhealthy area.

On August 17, 1933, the owner served notice of appeal on the Council from the above-mentioned order, the ground of appeal being that each house was capable, at a reasonable expense, of being rendered fit for human habitation.

The appeal was heard by the judge of Leicester County Court, who found that the two houses were situated back to back ; that there was no through ventilation ; that each house consisted of two rooms only ; that there was only one sanitary convenience for the two, and this was at a distance from them of 25 feet and was in an open yard. Each house was let, one at 5*s*. 6*d*. per week and the other at 4*s*. 1½*d*. per week, inclusive of rates. It was agreed that, on any reasonable standard, each house was not, and could not be rendered, by itself, fit

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who is an owner thereof, and, so far as it is reasonably practicable to ascertain such persons, upon every mortgagee thereof, notice of the time (being some time not less than twenty-one days after the service of the notice) and place at which the condition of the house and any offer with respect to the carrying out of works, or the future user of the house, which he may wish to submit will be considered by them, and every person upon whom such a notice is served shall be entitled to be heard when the matter is so taken into consideration."

Sub-s. 2 ; "The authority may if, after consultation with any owner or mortgagee, they think fit so to do, accept an undertaking from him, either that he will within a specified period carry out such works as will in the opinion of the authority render the house fit for human habitation, or that it shall not be used for human habitation until the authority, on being satisfied that it has been rendered fit for that purpose, cancel the undertaking."

Sub-s. 3 : "If no such undertaking as is mentioned in the last preceding sub-section is accepted by the authority, or if, in a case where they have accepted such an undertaking, any work to which the undertaking relates is not carried out within the specified period . . . . the authority shall forthwith make a demolition order requiring that the house shall be vacated within a period to be specified in the order . . . . and shall serve the order upon every person upon whom they would be required by subsection (1) of this section to serve a notice issued by them under that subsection."

for human habitation. The owner had, however, submitted to the Council a scheme for the combination of the two houses into one, but this had been rejected. On the facts before him the judge found that if the two houses were pulled down the site would be valueless, but if they were thrown into one, and the plans and specifications which had been produced were complied with, the value of the composite house would be 200*l.* and that the cost of complying with the plans and specifications would be 106*l.* 14*s.* 6*d.*; that this sum was a reasonable expense; and that the composite house would be (*a*) of a type suitable for occupation by the working classes; and (*b*) fit for human habitation. The owner gave through his counsel an oral undertaking to the court that he would carry out the works in accordance with the plans and specifications, with the addition of a skylight over the staircase, and that undertaking the judge was prepared to accept. It was contended, however, on behalf of the Council that inasmuch as each house by itself was not, and could not be made, fit for human habitation, the Court must confirm the demolition order and had no further jurisdiction in the matter. The judge declined to accept this contention and accordingly he quashed the demolition orders.

The Council appealed.

*O'Hagan* for the appellants. Part I. of the Housing Act, 1930, which is headed "Provisions with respect to the clearance or improvement of unhealthy areas," empowers the local authority to deal with houses *en bloc*, and Part II., in which the relevant section in this case comes, empowers the local authority to deal with single houses which in their present condition are unfit for human habitation. The question then is, can the local authority accept an undertaking such as was offered in this case to combine two houses, each of which is found to be unfit for human habitation? It is submitted that the local authority rightly said that they were not entitled to accept such an undertaking. If the view of the county court judge is right as to an undertaking to combine the two houses and thereby make one house fit for human habitation it may well be that the combined structure will be one outside the working class type as to rent and otherwise, and in consequence be withdrawn from the local authority's powers under the Act. Such a contingency was not contemplated by the framers of Part II. of the Act, and there is no warrant in the language of s. 19 for the proposal to do what the respondent offered and which the county court judge accepted. Moreover, difficulties may arise under the Rent Restriction Act.

*H. A. Hill* and *T. W. Naylor* for the respondent were not called upon.

Scrutton L.J. This appeal raises a short but interesting point under the Housing Act, 1930. Before, however, referring in detail to the provisions of the Act, I desire to state what the position of this Court is in connection with such appeals as this. Sect. 22 provides that any person aggrieved by (inter alia) a demolition order may appeal to the county court and the judge of that court can deal with the matter both on questions of law and on questions of fact, and, further, he may, if he thinks fit, accept from an appellant any such undertaking as might have been accepted by the local authority, and any undertaking so accepted by the judge is to have the like effect as if it had been given to and accepted by the local authority. From the decision of the county court judge an appeal lies to the Court of Appeal on any point of law; on any question of fact the county court judge's decision is final unless indeed it can be said that there was no evidence on which he could come to his decision. It is further provided by s. 22, sub-s. 4, that no appeal shall lie under the section from the decision of the Court of Appeal. We are therefore the final Court in the two cases now before us.

The appeal is brought on the ground that the county court judge accepted an undertaking from the owner which it is contended he was not entitled in law to accept, and it relates to two houses in Archdeacon Lane, Leicester. From the plan put before us it looks as if a building which seems externally to be one house is divided into two living rooms on the ground floor, two bedrooms on the top floor, two staircases in the middle, and two doors, one being a front door and the other a side

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door; it is in fact two houses, each with one living room, one bedroom, one staircase and one door; there is an open yard at the back in which is a sanitary convenience apparently used by the occupants of both houses. It is agreed that each house as it stands is unfit for human habitation, and that it cannot be made fit at a reasonable expense. Consequently the Council, after taking the proper steps, made a demolition order in respect of each house. But before the order was made the owner offered to combine the two houses into one house which would be fit for human habitation by an expenditure of 106*l.* 14*s.* 6*d.*—the combined house being worth 200*l.*—by the simple expedient of doing away with one staircase, fitting up the second living room as a kitchen, making the combined house with two bedrooms, and by building sanitary accommodation instead of leaving this in the yard. The local authority declined to accept that undertaking on the legal ground, as I gather, that the proposition to make two houses into one combined house fit for human habitation was not within their power to accept under the Act. Thereupon the owner appealed to the county court judge, who found that "if the two houses are thrown into one, and the plans and specifications produced to me are complied with, the value of the composite house will be 200*l.* The cost of complying with the plans and specifications will be 106*l.* 14*s.* 6*d.* The sum just mentioned is a reasonable expense. Upon compliance with the plans and specifications the composite house will be: (*a*) of a type suitable for occupation by the working classes; (*b*) fit for human habitation. In connection with these findings I have had regard to the matters mentioned in s. 62, sub-s. 3, of the Act, which says that 'in determining .... whether a house is fit for human habitation, regard shall be had to the extent, if any, to which by reason of disrepair or sanitary defects the house falls short of the provisions of any bye-laws in operation in the district, or of the general standard of housing accommodation for the working classes in the district.'" Having made these findings of fact the judge came to the conclusion that there was nothing in the Act to prevent such an undertaking as that made by the owner being accepted either by the local authority or by himself, and therefore he accepted it. He says: "I accept the undertaking of the [owner] to comply with the plans and specifications which have been produced on his behalf with the small addition of a skylight over the staircase. In my opinion this is an offer which the corporation should have accepted, but they would listen to none. I shall therefore quash the demolition orders." Sect. 19, sub-s. 2, of the Act says that the authority, and for this purpose that includes the county court judge, "may if, after consultation with any owner or mortgagee, they think fit so to do, accept an undertaking from him, either that he will within a specified period carry out such works as will in the opinion of the authority render the house fit for human habitation, or that it shall not be used for human habitation until the authority, on being satisfied that it has been rendered fit for that purpose, cancel the undertaking." In the county court counsel appear to have been so engrossed in the point of law, whether under the Act one house could be made out of two, that the judge was not asked to do what I have no doubt he would have done if he had been asked—namely, fix a period within which the work should be carried out. An undertaking which omits to specify this period is not one which either the local authority or the county court judge on appeal can accept. However, that was not the point the parties were fighting about, and what we propose to do is to give our opinion on the point raised by the parties—namely, whether the proposal to turn two houses into one is competent under the Housing Act, and having dealt with that we shall remit the matter to the county court judge so that he may consider any specified period suggested, and his decision on that point must be included in the undertaking. I desire further to say this in view of similar proceedings in other cases under the Act, that it is not convenient that the undertaking should be left in the way in which it was in this case, that is, by an oral offer by counsel on behalf of the owner embodied in the judgment of the county court judge. In our opinion there should be a written undertaking offered for acceptance in all future cases. That not only applies to an undertaking given to the county court judge but to one given to the local authority.

As to the question of the rights of the owner as against the local authority and the powers of the latter and of the county court judge on appeal to him, Part II. of the Housing Act, 1930, relates to "Provisions with respect to the repair or demolition of insanitary houses," and it begins with the case where the local authority is considering whether any dwelling-house which is occupied, or is of a type suitable for occupation, by persons of the working classes and as to which they have had a report as to its unfitness can be rendered fit for human habitation at a reasonable expense. The local authority can in such a case serve a notice on the owner requiring him within a reasonable time, not being less than twenty-one days, to execute the works specified in the notice, and stating that, in the opinion of the authority, those works will render the house fit for human habitation. There may be an appeal against that order: see s. 22; but if it is not appealed against the local authority is empowered to execute the necessary works. That involves, of course, a finding that the expense is a reasonable expense. But there may be a case where the house is not capable of being rendered fit for human habitation at a reasonable expense, and in such a case s. 19 says that the local authority shall serve upon the owner notice of the time and place at which the condition of the house and any offer with respect to the carrying out of works, or the future user of the house, which he may wish to submit will be considered by them, and the local authority may, if they think fit, accept an undertaking from the owner that he will within a specified period carry out such works as will in the local authority's opinion render the house fit for human habitation, but if no such undertaking is accepted, or, if accepted and the work is not carried out, the local authority may make a demolition order. In this case the local authority took the view that no amount of repairs would save the two houses as separate houses, and accordingly they gave notice to the owner that unless he could satisfy them with some offer they would make a demolition order, whereupon the owner said that he would throw the two houses into one at a cost of 106*l.* 14*s.* 6*d.*, which would make the house worth 200*l.* The local authority took the view that they could not, under the Act, accept that offer. From that came the appeal to which I have referred. In this Court the short legal point is, had the county court judge power to accept the owner's undertaking ? Having read the Act very carefully I can find nothing in it which precludes the local authority from accepting the owner's undertaking to make one house out of the two fit for human habitation by persons of the working classes. The undertaking when carried out will result in a better class of house for persons of the working class at a reasonable expense. Whether the draftsmen of the Act of 1930 had this in mind I do not know ; draftsmen sometimes do not appreciate the effect of the words they use ; but here the local authority are endeavouring to find in the Act some prohibition of the acceptance of an undertaking to provide a better house by throwing two houses into one, and I can find in the language of s. 19 no such prohibition. I do not decide what will be the position if in any cases two houses proposed to be dealt with in this way belong to different owners ; I shall wait till that case arises, for it is dangerous to lay down propositions of law without being certain of the facts. It has been suggested by Mr. O'Hagan that there may also be difficulties under the Rent Restriction Act. As to that I will go so far as to say that I do not at present see any difficulty, but again I do not know the facts as to the tenants, the terms of their tenancy, and I decline to express an opinion upon the matter. Mr. O'Hagan further suggested a somewhat complicated difficulty as to the contribution the local authority can get for two houses which are thrown into one house. I will not deal with that till the point arises, but on the question whether two insanitary houses can be turned into one sanitary house suitable for persons of the working classes I hold that the local authority and the county court judge had power to accept the owner's undertaking. The omission to insert in the undertaking a specified period within which the work should be carried out involves a question of fact with which we have no jurisdiction to deal, and therefore we must leave

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it to be dealt with by the county court judge. The appeal will be allowed and the case remitted for the inclusion in the undertaking of a period for carrying out the work.

SLESSER L.J. I am of the same opinion. To arrive at a conclusion in this case it is necessary to examine critically the provisions of ss. 17, 18 and 19 of the Housing Act, 1930. By s. 17 a local authority, upon being satisfied by official communications made to them that a dwelling-house suitable for occupation by persons of the working classes is unfit for human habitation, must do certain things. They have to satisfy themselves whether the house is capable at a reasonable expense of being rendered fit for human habitation, and if they decide that it is so capable they adopt one procedure: if they decide that it is not so capable, they adopt another procedure, and in considering whether the house is capable of being rendered fit at a reasonable expense, the reasonableness of the expense must be what they consider objectively to be reasonable, that is, considering the general condition of the house, the cost of labour, building material, etc., and not at that stage, at any rate, what the owner may think to be reasonable, for he is not yet taken into consultation. The local authority have to make that decision ex parte, and unaided by the views of the owner. If they come to the conclusion that the house is capable, at a reasonable expense, of being rendered fit they serve a notice upon the owner requiring him within a reasonable time to execute the necessary work. Sect. 18 provides that if within that time the owner does not execute the work the local authority may do it. It has been argued by Mr. O'Hagan that with regard to the requirement on the owner to execute the repairs the power is limited to the specific house which the local authority have had under consideration. I do not now propose to express a concluded opinion upon that point. I think there is force in the argument that ss. 17 and 18 are dealing with one specific house about which the local authority have considered the question whether it is capable of being repaired at a reasonable expense and that possibly at that stage their consideration is limited to the house and curtilage as defined by the Act. Mr. O'Hagan says that the reference to the rack-rent and the expense charged on the premises leads to that construction. I express no opinion upon that, as it is not a matter to be considered in the present case. The procedure may vary according to whether or not the local authority are satisfied that the house is capable of being rendered fit at a reasonable expense. In this case the local authority came to the conclusion on the objective test that the house was not capable of being rendered fit at a reasonable expense, and that being so the further procedure fell not under ss. 17 or 18 but under s. 19. Under the latter section the local authority's first duty on being satisfied that the house is unfit for human habitation is to serve upon the owner what I may call a notice to treat, that is, a notice that they will consider within a specified time any offer as to the carrying out of works or future user of the house. Sub-s. 2 says that the local authority may if they think fit accept an undertaking from the owner that he will carry out such work as will render the house fit for human habitation. An undertaking was given orally by counsel on behalf of the owner without, however, specifying the period in which the work would be done. Although ss. 17 and 18 are dealing with cases where the expense of rendering a house fit for human habitation must be reasonable, I cannot see any limitation in s. 19. Ex hypothesi before s. 19 comes into operation the local authority have already decided that the repairs cannot be carried out at a reasonable expense, but that does not preclude the owner from giving any undertaking he likes. In my opinion Mr. O'Hagan is wrong in saying that s. 19 is in any way limited or controlled by s. 17 or s. 18. I think the owner may under s. 19 give an undertaking in any way he thinks fit regardless of the expense; he is the judge of what undertaking he will give and it is for him to make the offer. If that is right I ask myself why this owner in respect of the house No. 89 should not give an undertaking to render it fit for human habitation by adding house No. 89½, the skylight, and the other matters appearing in the schedule. I then ask myself why he should not give a similar

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undertaking as to the house No. 89½, by adding house No. 89. There is nothing in s. 19 to prevent such an offer being made with regard to either house.

On the question raised by Mr. O'Hagan as to the Rent Restriction Act I do not think it necessary to consider it. If the undertaking is impossible of achievement that will have to be considered under s. 19, sub-s. 3, but the question does not arise in this case. Nor do I think that the argument as to the amount of compensation which may or may not be payable helps us to construe s. 19.

MAUGHAM L.J. I agree and will only add a few words on the construction of s. 19. In the first place I observe that sub-s. 1 does not require any work to be done by the owner of the house in question; it simply requires the local authority, where they have formed the opinion that the house cannot be repaired at a reasonable cost, to give notice to the owner, and then any offer by him with respect to the carrying out of works, or as to the future user of the house, is to be considered. Under sub-s. 2 the local authority are empowered, after consultation with the owner, to accept an undertaking by him, and Mr. O'Hagan's main argument is as to the ambit of the undertaking, which he contends can only be one to carry out within a stated period specific work on the dwelling-house as defined in s. 135 of the Housing Act, 1925, "dwelling-house" being there defined as including "any yard, garden, outhouses, and appurtenances belonging thereto or usually enjoyed therewith." The argument has been that the only undertaking that can be given by the owner or mortgagee is to do something on that limited property comprised in the definition of "dwelling-house." I may call attention to the fact that there is no doubt about the object of the Housing Acts; they were due to a recognition of the fact that the housing of the working classes was very unsatisfactory and very much smaller in extent than was desirable. This circumstance seems to me to require what has been called a benevolent construction to be put upon the consolidating Act, and there is no reason why the Court, unless compelled to do so, should give a construction to a

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particular section which would or might tend to defeat the object of the Act by diminishing the number of suitable houses available for the working classes. Why should the Court consider s. 19, sub-s. 2, as precluding the local authority from accepting from the owner or mortgagee an undertaking to carry out works in order to render the house completely fit for human habitation even if such works may not be within what may be described as the curtilage of the house? Sect. 19, sub-s. 1, requires no works to be done, and there can be no ground for saying that the works referred to in sub-s. 2 are contemplated in sub-s. 1. A house may be of an insanitary character by reason of one of the defects mentioned in the definition of "sanitary defects" in s. 62. For example, the lack of air space or lack of ventilation, or dampness, might render a house quite unfit for human habitation. To remedy such defects it might be requisite for work to be done outside the house. A case of dampness owing to water leaking in from a river is a very obvious one where work might have to be done on land not within the curtilage. Accordingly I decline to give such a restricted meaning to the undertaking which the local authority may accept under s. 19, sub-s. 2, as we have been invited to give. On the other matters I have nothing to add to what Scrutton L.J. has said.

*Appeal dismissed.*

Solicitors for appellants: *Field, Roscoe & Co., for H. A. Pritchard, Town Clerk, Leicester.*

Solicitors for respondent: *Robinson & Bradley, for Harding & Barnett, Leicester.*

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# ELLIOTT *v.* ALBERT.

[1933. E. 420.]

*Husband and Wife—Action for Enticement of Husband—Enticement by loans and gifts of money — Discovery — Interrogatories—Admissibility—Collateral charge of Adultery.*

The plaintiff, the wife of G. de C. Elliott, brought an action against the defendant, a married woman, for wrongfully enticing away the plaintiff's husband. She alleged that the defendant solicited the affections of her husband by providing him with large sums of money, and that on January 10, 1928, the plaintiff's husband in consequence of the defendant's enticement deserted the plaintiff, and that since then the defendant and the plaintiff's husband had lived together as man and wife. The plaintiff also alleged that in consideration of her abandoning her claim to maintenance under a maintenance order, her husband agreed to hand over to her a certain house which he had purchased, that she took possession of the house and had been forcibly evicted therefrom by the defendant's servants. The defendant in her affidavit of documents admitted that she had made certain loans and gifts of money to the plaintiff's husband and had in her possession certain documents relating thereto, but she objected to produce them on the ground " that they may tend to expose me to ecclesiastical censure and punishment." The defendant successfully resisted an application for the production of the documents. The plaintiff then applied for liberty to administer to the defendant certain interrogatories relating, mainly, to the gifts of money and to the purchase and mortgage of the house. The Master and the Judge in Chambers refused to allow the plaintiff to administer the interrogatories to the defendant. On appeal:—

*Held*, that inasmuch as the cause of action was not based on adultery and the object of the action was not to prove adultery, and the interrogatories which it was sought to administer were not addressed directly or indirectly to the sole proof of adultery but were intended to show the means by which the desertion of the plaintiff by her husband was procured, and to prove the trespass to a house in which the plaintiff was living by permission of her husband, therefore the interrogatories were admissible and the defendant was bound to answer them.

*Evans* v. *Evans and Blyth* [1904] P. 378, applied and followed.

*Redfern* v. *Redfern* [1891] P. 139, distinguished.

Appeal from a decision of Charles J. in Chambers.

The plaintiff, Isobel Kathleen Elliott, the wife of George de Corbin Elliott, on March 16, 1933, brought an action against the defendant, Sybil Albert, a married woman, claiming damages for wrongfully enticing away the plaintiff's husband and thereby depriving the plaintiff of his consortium ;

damages for trespass, and also damages for wrongfully causing the plaintiff to be evicted from "The Whins," Chalfont St. Peter. The plaintiff sued as a poor person.

The plaintiff's statement of claim, dated April 19, 1933, was as follows:—

"1. George de Corbin Elliott is and was at all material times the husband of the plaintiff as the defendant at all material times well knew.

"2. From the end of 1927, or thereabouts, until the 10th day of January, 1928, or thereabouts, the defendant wrongfully enticed and persuaded, and on the last-mentioned date procured, and thereafter continued to entice, persuade and procure the plaintiff's husband to deprive the plaintiff of his consortium.

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"The plaintiff will rely upon the fact that in and from the end of 1927, or thereabouts, the defendant constantly and persistently solicited the affections of the plaintiff's husband by (inter alia) providing him with large sums of money.

"3. On or about the 10th day of January, 1928, the plaintiff's husband, in consequence of the said enticement by the defendant, deserted the plaintiff, and from then until the present date the defendant has supported the plaintiff's husband, and during the greater part of this period the defendant and the plaintiff's husband have lived together as man and wife.

"4. In or about April, 1930, the plaintiff's husband purchased the freehold messuage known as 'The Whins,' Chalfont St. Peter, in the county of Buckingham.

"5. On the 16th day of February, 1928, the plaintiff applied for and obtained a maintenance order against her said husband in the Lambeth Police Court. By the said order the plaintiff's husband was ordered to pay the plaintiff the sum of 15*s*. weekly.

"6. In or about the month of June, 1931, the plaintiff's husband in consideration of her abandoning her claim to maintenance under the aforesaid maintenance order verbally agreed to hand over to her absolutely, subject to the claims of mortgagees, the said messuage 'The Whins,' and in pursuance of this agreement the plaintiff on or about the 30th day of June, 1931, took possession and went into occupation of the said messuage.

"7. On or about the 11th day of July, 1932, the defendant by her servants or agents wrongfully and by force entered 'The Whins' aforesaid without the consent and against the will of the plaintiff and ordered the plaintiff to evacuate the said house forthwith. The plaintiff refused to leave the said house and the defendant's servants or agents departed, wrongfully taking with them the key of the side door of the said house which was and is the property of the plaintiff.

"8. On the 4th day of August, 1932, the plaintiff was wrongfully and forcibly evicted from 'The Whins' aforesaid by the defendant her servants and agents, and the plaintiff's furniture and effects were thrown into the road by the defendant's servants or agents.

"Wherefor the plaintiff claims: 1. damages for the loss of her husband's consortium; 2. damages for trespass; 3. damages for wrongfully causing the plaintiff to be evicted from 'The Whins' aforesaid."

The defendant by her defence denied that she had enticed or persuaded or procured the plaintiff's husband to deprive the plaintiff of his consortium, or that the plaintiff's husband had in consequence of any enticement by the defendant or at all deserted the plaintiff.

The defendant admitted that "The Whins" was conveyed to George de Corbin Elliott on April 19, 1930, in consideration of the sum of 1700*l.*, and that the whole of the purchase money of 1700*l.* was provided by the defendant, and she alleged that by reason thereof the said Elliott held the house upon a resulting trust for her.

The defendant said that if George de Corbin Elliott purported to deal with the house as alleged by the plaintiff in para. 6 of the statement of claim he had no right or title so to do, and any such dealing was a breach of trust on his part and the plaintiff acquired no interest in or title to the house by reason thereof.

The defendant further said that on April 15, 1931, she instituted proceedings in the Chancery Division against George de Corbin Elliott asking for a declaration that the said house was vested in the said Elliott as a trustee for the defendant, and for an order that the said Elliott be ordered to convey the said house to the defendant. On May 10, 1932, the Court declared that the said house was vested in the said Elliott as trustee for the defendant and ordered the said Elliott to convey the said house to the defendant. In pursuance of that judgment Elliott on July 5, 1932, conveyed the house to the defendant. Before the house had been conveyed to the defendant her solicitors gave notice to the plaintiff by letter dated July 1, 1932, demanding possession of the house, and as the plaintiff ignored the letter the defendant's solicitors attended on the premises and requested the plaintiff to give up possession thereof. The judgment in the action and the deed of conveyance were shown to the plaintiff but she refused to go out or to recognize the defendant's title. The defendant's solicitors' representative thereupon left and brought away the key of the side door. No force of any kind was used. On July 15, 1932, the defendant issued a writ in the King's Bench Division against the said Elliott claiming possession of the house, and on July 23, 1932, she obtained judgment in default of appearance. In pursuance of the said judgment the defendant caused a writ of possession to be issued on July 23, 1932, whereupon the sheriff in obedience to the writ proceeded to deliver to the defendant possession of the said house. The defendant said that if the plaintiff was evicted on August 4, 1932, she was so evicted by the sheriff in the course of executing the said writ.

The defendant on September 25, 1933, made an affidavit of documents in which she swore (inter alia) "I say that between the end of 1927 and 1931 I did at the request of George de Corbin Elliott make him certain loans and gifts of money and that I have in my possession or power certain documents set out in the third part of the First Schedule hereto relating to such loans and gifts, but I say that such loans and gifts were not made for the purpose of soliciting the affections of the said George de Corbin Elliott nor of inducing him to leave his wife, and I submit therefore that the said documents do not relate to any matter in question in this action, but if contrary to my submission it shall be held that the said documents are relevant then I say that I object to produce the same on the ground that to the best of my knowledge, information and belief they may tend to expose me to ecclesiastical censure and punishment."

The plaintiff on November 2, 1933, applied to a Master in Chambers for an order that the defendant make a further affidavit of documents relating to bankers' passbooks from the end of 1927 to date of commencement of the action containing entries of cheques drawn by the defendant in favour of George de Corbin Elliott, and giving the dates of certain cheques; and also that the defendant be ordered within seven days to produce the documents referred to in part 3 of the First Schedule in the defendant's affidavit of documents. The Master made no order on that summons.

On November 16, 1933, the plaintiff applied to a Master in Chambers for leave to amend her statement of claim by striking out from para. 3 thereof the words " and during the greater part of this period the defendant and the plaintiff's husband have lived together as man and wife." The plaintiff also applied for an order for a further affidavit of documents and for production of documents similar to that applied for and refused on November 2, 1933. The Master again refused to make any order. The plaintiff appealed against that decision to Roche J. in Chambers, who on November 24, 1933, dismissed the appeal for want of prosecution.

On January 30, 1934, the plaintiff applied to a Master in Chambers for liberty to deliver to the defendant certain interrogatories and for an order that the defendant should answer the interrogatories within seven days.

The interrogatories which the plaintiff desired to administer to the defendant were as follows:—

" 1. Did you not between the end of 1927 and the year 1931 make gifts of money to the plaintiff's husband George de Corbin Elliott?

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"2. If the answer to Interrogatory No. 1 is yes, state the amount of such gifts of money ?

"3. Did you not from the 10th January, 1928, or thereabouts, until some other and what date, live at the same address with the plaintiff's said husband ?

"4. Did you not in or about April, 1930, provide the plaintiff's said husband with money to purchase the freehold messuage known as 'The Whins,' Chalfont St. Peter ?

"5. Did you in or about May, 1931, or upon some other and what date consent to the plaintiff's said husband executing a mortgage on 'The Whins' aforesaid ?

"6. If the answer to Interrogatory No. 5 is in the affirmative state whether the consent was in writing, and if it was in writing identify the document or documents."

The Master refused to order that the plaintiff be at liberty to deliver to the defendant the above interrogatories.

The plaintiff appealed against the decision of the Master to Charles J. in Chambers who, on February 6, 1934, dismissed the appeal.

The plaintiff appealed.

*Linton Thorp K.C.* and *C. J. T. Pensotti* for the appellant. The judge was wrong in disallowing these interrogatories. Both he and the Master considered that they were bound by the decision of the Court of Appeal in *Redfern* v. *Redfern* (1) to refuse to allow these interrogatories to be administered to the defendant. Bowen L.J. there said (2): "On the principles of law hitherto recognised as applicable to such cases, no interrogatories, moreover, addressed directly or indirectly to the sole proof of adultery, ought to be permitted." That case, however, was very different from the present. That was a petition for dissolution of marriage and the only issue in the suit was that of adultery. In the present case the issue is not that of adultery but only the enticement of the plaintiff's husband, and the interrogatories merely seek to establish gifts of money from the defendant to the plaintiff's husband as proof of the enticement. The Evidence Further Amendment

(1) [1891] P. 139. (2) Ibid. 149.

Act, 1869, provides that in "any proceeding instituted in consequence of adultery" the parties and the husbands and wives of parties shall be competent to give evidence, but that a witness shall not be asked nor bound to answer any question tending to shew that he or she has been guilty of adultery. That Act does not apply to the present proceedings as they are not proceedings instituted in consequence of adultery. Further the order for interrogatories should not have been refused at common law, because there was no averment of adultery. It was held in *Guardians of Nottingham* v. *Tomkinson* (1) that proceedings by guardians of the poor before justices against a husband to compel him to maintain a child which, although born of his wife in wedlock, he refused to maintain on the ground that he was not its father, were not "proceedings instituted in consequence of adultery" within the meaning of s. 3 of the Evidence Further Amendment Act, 1869, so as to make his evidence admissible to prove non-access to his wife and thereby bastardize the child. Grove J. in that case said (2): "My opinion is that the words 'proceeding instituted in consequence of adultery' apply to proceedings which are really instituted to produce the result of divorce as a consequence of adultery—there may be possibly other proceedings to which the words apply—but that they do not apply to such proceedings as those in the present case, which are not instituted in consequence of adultery and to bastardize, but to legitimatize the child." In *Evans* v. *Evans and Blyth* (3) a husband obtained a decree nisi in June, 1903, for the dissolution of his marriage on the ground of the adultery of his wife, and the decree was made absolute on December 21, 1903. On July 31, 1903, the respondent gave birth to a child of which the petitioner denied paternity. On a petition by the husband for the variation of the ante-nuptial settlements an issue was directed to be tried to ascertain the status of the child born of the respondent on July 31, 1903. Upon the hearing of the issue the co-respondent in the former proceedings was called as a witness by the petitioner and he was asked whether early in November, 1902, he committed adultery with Mrs. Evans. Objection was taken that if he answered the question he might subject himself to penalties, e.g., of ecclesiastical censure, and it was nevertheless held that he was bound to answer the question. Gorell Barnes J., in the course of his judgment, (1) cited *Reg.* v. *Boyes* (2) where Cockburn C.J. said (3): "We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. Now, in the present case, no one seriously supposes that the witness runs the slightest risk . . . . it was therefore the duty of the presiding judge to compel him to answer." Gorell Barnes J. went on to say that: "Apart from the question raised under s. 3 of the Evidence Amendment Act of 1869, this broader point as to the witness subjecting himself to penalties is purely imaginary and obsolete." That dictum directly applies in the present case. The respondent is not now asked to answer the fourth interrogatory, as that is admitted in the pleadings.

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(1) (1879) 4 C. P. D. 343.
(2) Ibid. 349.
(3) [1904] P. 274, 378.

*P. B. Morle* for the respondent. The decision of the Master and the judge in disallowing these interrogatories was right. The plaintiff is seeking to obtain the same information by means of interrogatories which she has already sought to obtain by discovery of documents. The order for discovery was refused and no appeal has been brought from that refusal. The issue of adultery is a material issue in the present case. It is true that an action for enticing away a wife or husband can be proved without alleging adultery, but in the present case

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(1) [1904] P. 380.
(2) (1861) 1 B. & S. 311.
(3) Ibid. 330.

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the plaintiff has alleged adultery in her particulars and relies upon adultery as a material allegation in the case.

A party to divorce proceedings cannot be asked whether he or she has committed adultery, because no one is bound to criminate himself. In *King* v. *King* (1) it was held that a party is not bound to answer articles to a libel which though not on the face of them criminatory may by possibility furnish a link in the proof of the charge of adultery against herself. Before 1869 the practice was to prohibit the discovery of documents tending to prove adultery. That protection was not confined to divorce causes; the principle was recognized as governing similar subject matter by common law and equity alike—See *Finch* v. *Finch.* (2)

Bowen L.J., in *Redfern* v. *Redfern* (3), said that "it is contrary to the principles of law recognised alike in the Common Law Division, the Chancery Division, and the Ecclesiastical Courts, that a wife or husband should be compelled to answer on oath as to matters tending to shew adultery, whether in the shape of discovery of documents or otherwise." Previously he had said: "On the principles of law hitherto recognised as applicable to such cases, no interrogatories, moreover, addressed directly or indirectly to the sole proof of adultery, ought to be permitted." The statute 14 and 15 Vict., c. 99, which rendered parties to a suit competent and compellable to give evidence expressly excluded any action, suit or proceeding instituted in consequence of adultery. That statute contemplated actions in a Court of Common Law instituted in consequence of adultery and therefore it was not confined to proceedings in the Divorce Court.

In *Evans* v. *Evans and Blyth* (4) the question arose on a petition to vary a marriage settlement after a decree for dissolution of the marriage in which an issue was directed in order to decide whether a particular child was entitled to benefits under the settlement. There the adultery of the mother of the child had already been established and was not in issue on the trial of the issue with regard to the paternity

(1) (1850) 2 Rob. Ecc. 153.
(2) (1752) 2 Ves. Sen. 491, 493.
(3) [1891] P. 139, 149.
(4) [1904] P. 274, 378.

of the child, and therefore that case is no authority in the present case where the question of adultery is a material issue.

*C. J. T. Pensotti* replied.

SCRUTTON L.J. This is rather a curious case, and some of the grounds alleged look rather odd in the year 1934.

A Mrs. Elliott brings an action against a Mrs. Albert in the King's Bench Division in which she alleges a well-established cause of action, namely, that the defendant had deprived her of the consortium of her husband ; and claimed damages for wrongfully enticing away the plaintiff's husband and thereby depriving her of the consortium to which she is entitled. She alleges as a second matter that her husband under a magistrate's order had to maintain her and he got her to waive that order by agreeing with her that she should live in a particular house, and she alleged that the defendant turned her out of that house. Those are the two causes of action alleged. It is obvious that both those causes of action can be proved without proving adultery between the plaintiff's husband and the defendant.

The statement of claim goes on for a considerable time without saying anything relevant to adultery. " From the end of 1927 or thereabouts until the 10th day of January, 1928, or thereabouts, the defendant wrongfully enticed and persuaded, and on the last-mentioned date procured, and thereafter continued to entice, persuade and procure the plaintiff's husband to deprive the plaintiff of his consortium." Adultery is not an essential element to that claim. " Particulars : The plaintiff will rely upon the fact that in and from the end of 1927 or thereabouts "—that is before the desertion—" the defendant constantly and persistently solicited the affections of the plaintiff's husband by (inter alia) providing him with large sums of money "—Adultery has nothing to do with that—" On or about the 10th day of January, 1928, the plaintiff's husband, in consequence of the said enticement by the defendant, deserted the plaintiff "—adultery has got nothing to do with that—" and from then until the present date the defendant has supported the plaintiff's husband "—adultery has got nothing to do with that—" and during the greater part of this period the defendant and the plaintiff's husband have lived together as man and wife "—that is an allegation of adultery. It is one of the matters that might be material in proving the interference with the right of consortium, but the loss of the right of consortium can be proved in a number of other ways which are alleged. Now the defence is a denial.

First of all as to the question of discovery of documents the defendant made this affidavit: "I say that I object to produce the same on the ground that to the best of my knowledge, information and belief they may tend to expose me to ecclesiastical censure and punishment." Lord Lindley in 1890 said that ecclesiastical censure as a punishment is practically obsolete, and I should think that is still more true in 1934. I should not think there is likely to be any ecclesiastical censure and punishment for enticing away a wife's husband. That plea was allowed by the Master and the judge and was not appealed from further.

The next rather odd thing was that the plaintiff applied to amend the statement of claim by striking out the words "and during the greater part of this period the defendant and the plaintiff's husband have lived together as man and wife." Oddly enough the defendant opposed that; she did not want to be freed from the allegation that they lived together as man and wife. She was doing that as a matter of tactics to avoid the discovery of documents or interrogatories.

Now comes the matter which is before us. The plaintiff applied for leave to administer interrogatories and the first two relate to gifts of money alleged to have been made to procure the loss of consortium. The third is: "Did you not from the 10th January, 1928, or thereabouts, until some other and what date, live at the same address with the plaintiff's said husband?" The fifth and sixth interrogatories are two interrogatories addressed to show that the defendant had consented to the plaintiff's husband dealing with the house which is the subject-matter of the claim for trespass. The Master and the judge decided against both discovery of documents and interrogatories, relying on the decision of the Court of Appeal in *Redfern* v. *Redfern* (1), which was a petition for dissolution of marriage. That case came into Court because the person who was asked to make discovery was an infant, and there is a rule in all Divisions of the High Court that infants cannot be compelled to make discovery either by interrogatories or by discovery of documents, but being in the Divorce Court the question was raised, whether inasmuch as she was being charged with adultery discovery could be ordered against her, irrespective of whether or not she was an infant. Both Lindley L.J. and Bowen L.J. pointed out that discovery in divorce cases was permissible both by discovery of documents and by discovery by interrogatories. Lindley L.J. points out that discovery as to cruelty or desertion in a divorce case is permissible. He goes on to say (2): "On the other hand, adultery being an ecclesiastical offence . . . . it would be wrong to compel discovery by means of interrogatories, the object of which is to obtain answers tending to show that the person interrogated has been guilty of adultery," and then he says: "If there is reason to believe that the affidavit is required only for the purpose of discovering documents tending to prove adultery by the person required to make the affidavit no order for such affidavit ought to be made." Bowen L.J., having gone through the statutes, says (3): "On the principles of law hitherto recognised as applicable to such cases, no interrogatories, moreover, addressed directly or indirectly to the sole proof of adultery, ought to be permitted."

Now the question would arise, and in fact did arise: as to what the position is when the object of the action is not to prove adultery, when the cause of action is not based on adultery. In my view in such a case a different answer ought to be given, and so it appears from the decision of Gorell Barnes J. in *Evans* v. *Evans and Blyth*. (4) In that

(1) [1891] P. 139.
(2) Ibid. 146.
(3) [1891] P. 149.
(4) [1904] P. 274, 378.

case there had been proceedings for divorce, and adultery had been proved, but the question then arose on a proposal to vary the settlements, whether a child to which the wife had given birth was the legitimate child of the husband and wife or whether it was the child of the wife by the co-respondent, and the co-respondent, being put in the witness-box, was asked : " Did you, early in November, 1902, commit adultery with Mrs. Evans ?" at a place named, and the objection was made that the witness was not bound to answer because the answer would convict him of adultery and he would be liable to ecclesiastical censure. It was held by Gorell Barnes J. that, the issue in the proceeding being the determination of the status of the child and not the proof of adultery, the witness was compelled to answer the question.

The present case seems to me to be exactly a matter of that sort. The plaintiff proposes to prove that the defendant enticed her husband away from her, whereby she was deprived of the consortium to which she is entitled under the common law. That cause of action can be proved without proving adultery at all ; adultery is only one of the matters which may be relevant to establish the cause of action, which is entirely independent of adultery. It appears to me to be immaterial whether one of the elements which may be alleged to prove the loss of consortium is adultery. The cause of action has nothing to do with adultery, and can be proved without proving adultery. It appears to me that the interrogatories do not come within the language of Bowen L.J. and Lindley L.J. as being " addressed directly or indirectly to the sole proof of adultery " or " wanted solely for the purpose of proving adultery ;" they are wanted for proving a cause of action which has nothing to do with adultery, but which has to do with the loss of consortium.

Now test the interrogatories by that. The first one is : " Did you not between the end of 1927 and the year 1931 make gifts of money to the plaintiff's husband George de Corbin Elliott." That is intended to show the means by which the desertion, which happened in 1928, was procured. So far as I can see, that has nothing to do with adultery at all. It appears to me to be clear that interrogatories 1. and 2. should be allowed. Interrogatories 5. and 6. are addressed to proving the matter alleged at the end of the statement of claim, namely, trespass to a house in which the wife is living by permission of the husband, permission being given by him to free him from liability under a maintenance order. It seems to me that the interrogatory is not put solely to prove adultery; adultery may have nothing to do with it. The matter about which I have had more doubt is the third interrogatory: "Did you not from the 10th January, 1928, or thereabouts, until some other and what date, live at the same address with the plaintiff's said husband?" That interrogatory, I think, may be relevant if the object of the action is to prove adultery, but it is equally relevant, it appears to me, to prove the enticement which led to the plaintiff being deprived of the consortium of her husband and to show incidentally the object for which the defendant used the enticement which procured the loss of consortium.

I have, therefore, come in this case to the opinion that these interrogatories are admissible and must be allowed. The appeal, therefore, must be allowed with such costs here and below as can be recovered by a poor person.

MAUGHAM L.J. I agree and will add a few remarks on the perhaps interesting question whether interrogatory No. 3. is a proper interrogatory to be allowed in the present case, the nature of the action having been described by my brother Scrutton. I would observe that the action is in the nature of a common law tort based on the view that without lawful justification the defendant has enticed the plaintiff's husband to leave her. It is not, as I understand it, an action based in any way on adultery or on a ground of which the ecclesiastical courts were solely seised. A question arises as to the admissibility of an interrogatory which I will concede might be a step in the proof of an allegation that the plaintiff's husband had committed adultery with the defendant.

The right to deliver interrogatories at the present time is based upon Order XXXI, and particularly rr. 1, 2 and, I think, 3 of that order, and it is no longer necessary to go back to the practice of the old Court of Chancery for the purpose of ascertaining what interrogatories may be delivered. Rule 1 of Order XXXI, however, which states the general principle as to the right to discovery by interrogatories is not intended to take away the general right of the party to whom the interrogatories are delivered to object to answer certain interrogatories on well recognized grounds. It may be worth remembering that in the Annual Practice the note to Order XXXI has the high authority of Sir Edward Bray, the author of Bray on Discovery, and we may take it as being the last statement of his views on the subject of discovery by interrogatories. He points out in the note that there is a right to refuse to answer an interrogatory or to give any discovery which will tend to incriminate the party interrogated or expose him to the risk of any kind of punishment whether it be by pains, penalties or forfeiture. I do not doubt then that prima facie there is that general right on the part of the defendant to refuse to answer the third interrogatory, if it could be truly stated that in the present action to answer that interrogatory would expose the defendant to some kind of punishment, and it is in that connection that the case of *Redfern* v. *Redfern* (1) is appealed to by the defendant. Now in the first place I would observe that it is well settled in an ordinary case that an objection of this kind ought to be taken on oath in the answer. I am aware that some people think that leads to waste of money, and it may be that the rule is not as strict as it used to be. I might mention that in a decision of the Court of Appeal the case of *Redfern* v. *Redfern* (1) is treated as being a somewhat special case depending on the fact that the question there determined was on a petition by a husband for dissolution of marriage. It is to be observed that in *Redfern* v. *Redfern* (1) the question was whether the respondent, who happened to be a minor, was bound to make an affidavit as to documents. That is the only point which was before the Court of Appeal, the action being an action for dissolution of marriage, and that was the only question with which the Court was really concerned. The judgments of Lindley L.J. and Bowen L.J. proceeded upon a consideration of the old practice of the Ecclesiastical Courts in a case of that kind (with which we have, as I conceive it, nothing to do here), and the practice after the power of the Ecclesiastical Courts had been superseded of requiring discovery in divorce cases. After having considered in some detail that ancient practice, they came then to the statute 32 & 33 Vict., c. 68, s. 3, which, I may mention, is now to be found in s. 198 of the Judicature Act, 1925, and they pointed out that the statute dealing, as it did, with answers by witnesses viva voce in proceedings based upon adultery, threw no doubt whatever upon the view that the old practice in regard to divorce cases and to questions which should be asked tending to establish adultery still continued. Having come to the conclusion that that practice continued, the Court of Appeal decided that no order for discovery or for an affidavit ought to be made in such a case, if discovery or the affidavit was wanted solely for the purpose of proving adultery. That is most clearly stated by Lindley L.J. (1), and the statement of the general rule by Bowen L.J. (2), I take to be to the same effect. The proposition is not, however, sound that by reason of the decision in *Redfern* v. *Redfern.* (3) no man or woman can be asked if they have committed adultery. For my part I see no reason to doubt that the decision of the late President of the Divorce Court in the case of *Evans* v. *Evans and Blyth* (4) was a correct decision. There, after a decree for divorce had been obtained, the co-respondent was called as a witness on the hearing of an issue for the purpose of determining whether a child born during wedlock was or was not legitimate, the question being in these words: "Did you, early in November, 1902, commit adultery with Mrs. Evans (at a place named)?" In order to allow that question to be asked the learned judge considered very carefully the principles which were involved,

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(1) [1891] P. 139.

(1) [1891] P. 146.
(2) Ibid. 149.
(3) [1891] P. 139.
(4) [1904] P. 378.

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including the case of *Redfern* v. *Redfern* (1) and a number of other authorities, and he came to the conclusion that the co-respondent was running no risk of ecclesiastical censure or forfeiture if he were compelled to answer the question, and he was therefore made to answer it. He cited some exceedingly pertinent remarks by Cockburn C.J., of which I will take the liberty of reading one sentence, in order to justify his view. Cockburn C.J. in *Reg.* v. *Boyes* (2) said: "We are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." As I understand the judgment in *Evans* v. *Evans and Blyth.* (3) Gorell Barnes J. thought that that was, in a case where adultery was not the issue in the action, a sufficient ground for compelling a man to answer the question as a witness. In my opinion, if the danger of ecclesiastical censure is shown to be imaginary there is no reason, according to the modern law, for refusing to allow the interrogatory to be put, and I go further and say that, in my opinion, the person to whom the interrogatory is administered is not entitled to refuse to answer a proper question, such as the question involved here in the third interrogatory, on the ground of this fanciful suggestion that some ecclesiastical censure may follow. I referred to the limitation to be put upon the case of *Redfern* v. *Redfern* (1) as a matter which has already been before the Court of Appeal. It came before the Court of Appeal in the celebrated case of *Spokes* v. *The Grosvenor and West End Railway Terminus Hotel Co., Ld.* (4), where a number of fraudulent directors—I say "fraudulent" because their fraud was subsequently established—objected to giving discovery of documents on the ground that discovery might tend to incriminate them. They relied upon the case of *Redfern* v. *Redfern* (1) where

(1) [1891] P. 139.
(2) 1 B. & S. 311, 330.
(3) [1904] P. 378.
(4) [1897] 2 Q. B. 124.

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the Court had, as I have already said, stated that the affidavit of documents ought not to be required. It came before the Court of Appeal, and there were present Lord Esher M.R., A. L. Smith L.J. and Chitty L.J., and all three referred to *Redfern* v. *Redfern*. (1) I need not cite all their observations. Lord Esher, after referring to a previous decision to the effect that if a person thought he had an objection to an interrogatory he must take it on oath, said (2): "It is said that this decision, which was given in 1878, is in conflict with *Redfern* v. *Redfern* (1), which was decided in 1890; but this latter case was decided"—now mark these words—"on the particular provisions of the Divorce Acts, and is not an authority as to the general law of discovery," and the other two lords justices in effect agreed with that. To my mind it is a mistake to suppose that *Redfern* v. *Redfern* (1) established that in no case can a party be interrogated if the answer to the interrogatory might tend to incriminate him in the sense of tending to show he committed adultery and thus would expose him to the risk of ecclesiastical censure, although at the same time I do not intend to throw the smallest doubt on the propriety of the rule in a proceeding founded on divorce.

For these reasons I think the interrogatories in question ought to be allowed.

*Appeal allowed.*
*Order that the plaintiff be at liberty to administer Interrogatories Nos.* 1, 2, 3, 5 *and* 6.

Solicitors for appellant: *Close & Co.*
Solicitors for respondent: *Powell, Rogers & Merrick.*

(1) [1891] P. 139. (2) [1897] 2 Q. B. 132.

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[1933. R. 136.]

*Appeal—Poor Person—Action not brought by plaintiff as Poor Person—Certificate of Law Society to plaintiff to bring appeal to Court of Appeal as Poor Person—Necessity to obtain leave of Trial Judge or of Court of Appeal—Discharge of certificate by Court—Order for security for costs—R. S. C., Order* 16, *rr.* 29, 31 *E and F.*

A person who has not taken, defended or been a party to any proceedings as a poor person in the High Court, but who has obtained under Order 16, r. 31 F, a certificate from the Poor Persons' Committee of the Law Society admitting him to appeal to the Court of Appeal as a poor person, cannot appeal to the Court of Appeal as a poor person unless he has obtained the leave of the judge before whom the matter was heard, or the leave of the Court of Appeal, inasmuch as the concluding words of r. 31 F make the provisions of r. 31 E apply to such a case.

In the circumstances of the case leave to appeal as a poor person to the Court of Appeal was refused and the certificate given to the plaintiff by the Poor Persons' Committee admitting him to appeal to the Court of Appeal as a poor person was discharged by the Court of Appeal of its own motion under r. 29 of Order 16. Order for security of costs against the plaintiff and his next friend as a condition of prosecuting the appeal.

MOTION.

On January 1, 1933, Jack Rodriques, his wife, and a Mrs. Kaffebaum were riding in a Daimler motor car, which they had hired from the second defendant Salmon, and in which they were going to a wedding. While proceeding along Belsize Park, Hampstead, the Daimler car came into collision with another car belonging to and driven by the first defendant, Dr. Bakewell. The impact however was only a slight one, and the cars were only very slightly damaged.

On January 18, 1933, Jack Rodriques and his wife commenced an action against Dr. Bakewell and Salmon, claiming damages for personal injuries sustained by each of the plaintiffs owing to the negligence, joint or several, of the two defendants or their servants.

A similar action was commenced by Mrs. Kaffebaum. The two actions were consolidated on February 9, 1933.

It was alleged that owing to the collision Jack Rodriques received a blow on the head and suffered a severe nervous shock and had been in a state of coma since the accident and was suffering from post concussion neurosis. He subsequently became in a state of complete mental deficiency indistinguishable from insanity.

On October 17, 1933, Percy Maurice Rodriques, a son of Jack Rodriques, was appointed by Master Simner to act as next friend of the plaintiff Jack Rodriques in the action, and the writ of summons and all subsequent proceedings were accordingly amended.

The action was tried before Avory J. and a special jury on December 6, 7, 8, 12 and 13, 1933, when the jury returned a verdict that the drivers of both motor cars had been guilty of negligence but that neither of the plaintiffs had sustained any damage thereby. Judgment was accordingly entered for the two defendants with costs which, so far as the plaintiff Jack Rodriques was concerned, were to be paid by his next friend.

The costs of the defendant Bakewell had been taxed at over 800*l.*, and the costs of the defendant Salmon had been taxed at 400*l.* These costs had not been paid.

Notice of appeal against the above verdict and judgment and of an application for a new trial was given on January 24, 1934, on behalf of Jack Rodriques (by his next friend), and by Rachael Rodriques, the wife of Jack Rodriques, but Mrs. Rodriques subsequently withdrew her appeal.

A summons was taken out on February 17, 1934, by the plaintiff Jack Rodriques in person for the removal of his next friend, Percy Maurice Rodriques, on the ground that he (Jack Rodriques) was no longer a person of unsound mind. His mental condition had greatly improved since December, 1933.

The two defendants on February 26 applied to the Court of Appeal for an order for security for costs. This application was adjourned pending the hearing of the summons for the removal of the next friend of Jack Rodriques.

On February 27 Master Simner heard that summons and made an order discharging Percy Maurice Rodriques from being next friend to Jack Rodriques in this matter upon condition that the next friend within ten days brought into Court by way of security against the costs previously incurred by him the sum of 30*l*. in respect of each defendant. These sums had not been paid into Court.

The plaintiff Jack Rodriques on February 27 obtained from the Poor Persons' Committee of the Law Society a certificate admitting him to prosecute the appeal as a poor person and nominating solicitors to conduct the proceedings on his behalf.

The Court of Appeal on March 12 gave leave to Jack Rodriques and his next friend to appeal from Master Simner's order direct to them, and adjourned the defendants' application for security of costs till the hearing of that appeal.

When the case was called on on March 26 SCRUTTON L.J., addressing the counsel in the case, said: The Court has taken the opportunity since the adjournment of looking into the Rules (1) more carefully than it has hitherto had an opportunity of doing, and has consulted the Master of the Rolls. The Court will hear argument on the subject, so what I am about to say is not final. The Court is at present of the opinion that whether a party to an action becomes a poor person during the hearing in the Court of first instance, or whether he becomes a poor person after the first judgment and before he appeals to the Court of Appeal, in either case leave to appeal as a poor person must be obtained from either the judge of first instance or the Court of Appeal. What has largely influenced the Court in coming to that conclusion are the last words of Order 16, r. 31 F: "And upon such certificate being filed in the Central Office the provisions of the preceding rules shall mutatis mutandis apply to all proceedings in the Court of Appeal." One of the preceding rules is 31 E. The last two lines of r. 31 F, in the view of the Court, subject to what argument is addressed to them, brings in r. 31 E. The litigant in r. 31 E is a poor person when he starts as a litigant, and the litigant in r. 31 F becomes a poor person after the judgment against him in the Court of first instance. Each of them has a certificate of the Poor Persons' Committee, but r. 31 E. does not enable the litigant under that rule to prosecute his appeal as a poor person to the Court of Appeal without the leave of the judge who tried the case or of the Court of Appeal. The question is whether the last words of r. 31 F do not put the litigant under that rule in the same position as the litigant under r. 31 E. The Court has consulted Avory J., who writes: "The jury found that neither of the plaintiffs had suffered any damage, and I agree with their verdict. It was a fraudulent claim. I should certainly not have given any facility for appeal." That I think disposes of any chance of success in applying to the learned judge below for leave to appeal. That leaves the matter in this position, that the plaintiff, whoever he is, whether he is the next friend or the original plaintiff, has not any chance of obtaining the leave of the learned judge below, and he cannot appeal as a poor person, if our view is correct, on which we are open to hear argument, unless he obtains leave to appeal as a poor person from the Court of Appeal. Supposing he does not obtain leave from the Court of Appeal it will still be open for him to proceed with his appeal but not as a poor person; in that case, however, it will be a matter for security for costs. We are open to hear what either counsel desires to say upon that aspect of the matter.

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(1) Rules of the Supreme Court, Order 16, r. 29, sub-r. 1: "The Court or a Judge may at any time (and whether or not any application be made by any Law Society or by any person for that purpose) discharge the certificate and direct it to be taken off the file and thereupon the poor person shall not be entitled to the benefit of this Order in any proceedings to which the certificate relates unless otherwise ordered."

Rule 31 E: "There shall be no appeal as a poor person to the Court of Appeal by anyone admitted to take or defend or be a party to any legal proceedings under the Rules of this Order without leave of the Court or of the Judge before whom the matter is heard or of the Court of Appeal."

Rule 31 F: "If any person who has not taken, defended or been a party to any legal proceeding as a poor person in the High Court and any party to proceedings in a Court other than the High Court from which an appeal lies direct to the Court of Appeal shall be admitted on an appeal to the Court of Appeal as a poor person on obtaining a like certificate as is provided by the Rules of this Order for the High Court and upon such certificate being filed in the Central Office the provisions of the preceding rules shall mutatis mutandis apply to all proceedings in the Court of Appeal."

*Doughty K.C.* and *A. F. Engelbach* for the defendant Bakewell asked the Court not to give the plaintiff, Jack Rodriques, leave to appeal as a poor person; to discharge the certificate granted to him by the Poor Persons' Committee to prosecute his appeal as a poor person, and for an order that the plaintiff should give security for costs if he proceeded with his appeal, and that his next friend should also give security if he prosecuted the appeal.

*James MacMillan* (*J. D. Cassels K.C.* with him) made a similar application on behalf of the defendant Salmon.

*N. K. Lindsay* for the plaintiff Jack Rodriques and for his next friend. There are two questions for decision here, first whether the next friend should be discharged upon the plaintiff Jack Rodriques ceasing to be under mental disability, and, secondly, whether, if the next friend is discharged, Jack Rodriques may proceed with his appeal as a poor person. Dealing with the second question first I submit that under the Rules, inasmuch as the plaintiff has obtained a certificate from the Poor Persons' Committee admitting him to prosecute his appeal as a poor person, the leave of the trial judge or of the Court of Appeal is not necessary. Rule 31 F of Order 16 says that "the provisions of the preceding rules shall mutatis mutandis apply to all proceedings in the Court of Appeal," that means that the preceding rules can only be incorporated in r. 31 F if they deal with something which mutatis mutandis can be made to apply to the Court of Appeal. But r. 31 E cannot be incorporated in r. 31 F, because the rule already applies to proceedings in the Court of Appeal, and to make it apply to r. 31 F would merely be to substitute for the class of persons to which it already applies another class of persons—namely, persons who have been admitted to prosecute appeals as poor persons. There are other sub-rules of r. 31 upon which the provision of r. 31 F can operate and which mutatis mutandis can be made to apply to proceedings in the Court of Appeal, for example, rr. 31 B, 31 C and 31 D, but not r. 31 E.

[SLESSER L.J. Rule 31 F appears to be directory. It says: "The provisions of the preceding rules shall mutatis mutandis apply to all proceedings in the Court of Appeal" and not

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merely that the provisions of rr. 31 B, C and D shall mutatis mutandis apply, leaving out r. 31 E. What authority is there for leaving out r. 31 E if it can be applied mutatis mutandis ?]

If that is so no alteration would have to be made in r. 31 E in order to make it apply to all proceedings in the Court of Appeal instead of to proceedings in the Court below ; it would be making a rule, which does already apply to proceedings in the Court of Appeal, apply to one class of persons instead of to another class. In granting a certificate the Poor Persons' Committee have to consider whether the applicant is poor and whether he is deserving of being allowed to litigate in the Court of first instance. In that case the question whether he shall be allowed to appeal as a poor person to the Court of Appeal has, under r. 31 E, to be decided by the trial judge or by the Court of Appeal. But when a person, who has not been in the Court below a party to legal proceedings as a poor person, applies under r. 31 F to the Poor Persons' Committee for a certificate to appeal to the Court of Appeal as a poor person the Committee have to decide whether the person is deserving of being allowed to appeal to the Court of Appeal as a poor person, and therefore the Poor Persons' Committee in that case acts as a safeguard to the respondent in the same way as in the other case under r. 31 E the trial judge or the Court of Appeal acts as a safeguard.

If the Court thinks leave to appeal is necessary I ask for leave to appeal on the grounds of misdirection and the conduct of the trial, the recovery of the plaintiff, and fresh evidence which was not available at the trial owing to the plaintiff's insanity. Unless the plaintiff is allowed to bring his appeal as a poor person he will not be able to go on with his appeal.

Scrutton L.J. We do not desire to hear you, Mr. Doughty. This case is a little complicated, and it is necessary to state clearly what we are doing. An action was brought against the owner of a taxi-cab and a doctor owning a car, who either by individual negligence or by the negligence of both were alleged to have damaged three people, Mr. Rodriques, Mrs. Rodriques and another lady. The action,

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which was not brought by the plaintiffs as poor persons, took five days to try. At the end of the plaintiffs' case and after the defendants' counsel had addressed the jury, they wanted to stop the case, and the learned judge very properly said that they must hear the plaintiffs' counsel if he wished to address them. They not only heard the plaintiffs' counsel, but also all the evidence called by the defendants, and at the end they found that none of the plaintiffs had suffered any damage caused by the accident, that the claim was a fraudulent one, and the learned judge writes to us to say that he agreed with the verdict. The two ladies, Mrs. Rodriques and the other lady, are taking no further part in the proceedings. The other lady has not appealed at all; Mrs. Rodriques has appealed and withdrawn her appeal, so we are merely dealing with the position of Mr. Jack Rodriques.

Mr. Jack Rodriques has obtained a certificate from the Poor Persons' Committee under Order 16, r. 31 F, to proceed with his appeal to the Court of Appeal as a poor person. That certificate involves two things: (1.) that the applicant is poor, and (2.) that he has sufficient merits in his appeal. The first question we have to consider here is, what under the Rules is the position of such a person ? I am of opinion that he is subject to two duties or risks. First of all, Order 16, r. 29, says: "The Court or a judge may at any time (and whether or not any application be made by any Law Society or by any person for that purpose) discharge the certificate and direct it to be taken off the file and thereupon the poor person shall not be entitled to the benefit of this Order in any proceedings to which the certificate relates unless otherwise ordered." That action may be taken by the Court without any application by any party, and it may be taken, in my view, either on the ground that it is proved that the plaintiff is not poor, or on the ground that it is proved that the plaintiff has not sufficient merits to entitle him to proceed as a poor person. That is one difficulty to which the plaintiff is subject. The other difficulty is this. Order 16, r. 31 E, says: "There shall be no appeal as a poor person to the Court of Appeal by anyone admitted to take or defend or be a party to any legal proceedings under the Rules of this Order without leave of the Court or of the Judge before whom the matter is heard or of the Court of Appeal." That assumes that a poor persons' certificate has been granted, and yet makes the appeal of the poor person subject to the leave of the judge or the Court of Appeal. It is quite clear from the letter we have received from Avory J. that he would not give any leave. A question may be raised whether r. 31 E, although in terms it applies to every poor person, applies to a person who was not a poor person in the Court below. Rule 31 F expressly relates to a person who was not a poor person in the Court below, and who obtains a certificate in order to appeal as a poor person. That rule winds up with the words: "upon such certificate being filed in the Central Office the provisions of the preceding rules shall mutatis mutandis apply to all proceedings in the Court of Appeal." If r. 31 E did not expressly apply to all proceedings, r. 31 F would bring under its purview the case where the man was not a poor person in the Court below, but has subsequently obtained a poor persons' certificate in order to appeal. On all these grounds, I am of opinion that the plaintiff, although he obtained a certificate, after the hearing in the Court below, admitting him to appeal to the Court of Appeal as a poor person, cannot appeal as a poor person unless he has either the leave of the judge below, or the leave of the Court of Appeal. It is quite clear from Avory J.'s letter that he, being the judge of the Court below, will not give leave. The next question is, shall the Court of Appeal give leave to appeal? Now leave to a person to take, defend or be a party to legal proceedings as a poor person may be very beneficial and just to the poor person, but may, if the poor person brings appeal after appeal, be very unjust to the other party. In this particular case the plaintiff and his wife and another lady brought an action against two owners of motor cars, and those owners of cars have both won before the jury, and the learned judge agrees with the verdict. The taxed costs which at present the plaintiff has inflicted upon people who have won before a judge and jury are 1200*l.*, which the defendants cannot recover from the plaintiffs, because

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none of them has any money. It is now asked that the unsuccessful plaintiff, who has put the two persons he has sued to taxed costs of 1200*l.*, shall have an opportunity of increasing their loss, and possibly winning himself, by an appeal which does not, and cannot, ask for judgment, but which will involve a second trial if it is successful. In my view one ought to be very careful in allowing appeals to be brought not to put an unnecessary and an extravagant burden upon the party who is successful below, and who ought not to be mulcted in further costs unless it is fairly clear that the appellant has a reasonable chance of success. Now in the present case what happened was that the driver of a car going along a main road saw another car coming out of a side street, and in order to avoid a collision turned away into a side street, and was just caught up by the other car, the resulting collision doing so little damage to the car that it was able to run in service the same day, and doing so little damage to two of the passengers that one went on to the wedding which she was proposing to attend, although she was afterwards a plaintiff in the action, and the other lady, after the jury had found she had suffered no damage, appealed, and then dropped her appeal. It is suggested that the male plaintiff was so seriously damaged by a shock, which did not really injure the other people in the car, that he subsequently became insane. Now that question was thrashed out before the jury for five days with expert witnesses on either side, and the jury have found that there was no damage done by the accident to the male plaintiff, and the judge says he agrees with the verdict. In those circumstances I am of opinion that the Court of Appeal should not allow the plaintiff, who has already put the two successful defendants to costs amounting to 1200*l.*, which they cannot recover from him, to put the risk of further costs upon them and that leave to appeal as a poor person should be refused.

That does not stop the appeal. The plaintiff is at liberty to go on with his appeal, but he must go on subject to the risk of security for costs being ordered against him, and we make an order that if he goes on with his appeal he shall give security for costs to the extent of 100*l.* for each defendant.

There remains now the question of what is to happen about the next friend, and I will hear anything that counsel desire to say about the position of the next friend. I am inclined to the view, although this is not part of my judgment, that just as an infant can proceed when he comes of age without the next friend being discharged, so a person of unsound mind, when he becomes of sound mind, can appear without getting the next friend discharged. Neither the next friend nor the plaintiff will be allowed to proceed with the appeal until that security is given.

GREER L.J. I entirely agree with the judgment which has just been delivered by my Lord. The vigorous argument of Mr. Lindsay is a signal instance of the valiant industry and skill which is afforded by members of the Bar to poor litigants, but he has failed to persuade me either that the plaintiff can proceed as a poor person without leave under the Rules, or, in the alternative, requiring leave, that he ought to be given leave. I think he does require leave and I do not think leave to appeal ought to be given to him. I think it would be doing very great injustice to the defendants if we gave leave in a case of this sort. This case has already been tried at great length by an experienced judge and jury, and the jury have given their verdict in favour of the defendants. I think the matter ought to rest there, and the litigation ought to come to an end.

I agree with my Lord as to the amount of security which must be given if Mr. Rodriques desires to continue this litigation.

SLESSER L.J. I agree, and I propose only to say a very few words on the question of practice as it is affected by Order 16, rr. 31 E and 31 F. Rule 31 E in terms says: "There shall be no appeal as a poor person to the Court of Appeal by anyone admitted to take or defend or be a party to any legal proceedings under the Rules of this Order without leave of the Court or of the Judge before whom the matter is heard or of the Court of Appeal." Now it might be argued that under

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that provision a person who was not a poor person at the time of the termination of the case in the Court of first instance would not be a poor person appealing, because he only became a poor person after the decision in the lower Court, and for that reason there has been inserted r. 31 F, which deals with "any person who has not taken, defended or been a party to any legal proceedings as a poor person in the High Court," and it provides that such a person shall be admitted on an appeal to the Court of Appeal as a poor person on obtaining a poor persons' certificate. It might be doubtful whether the obtaining of that certificate would be or would not be sufficient to enable such a person to proceed with his appeal to the Court of Appeal without any leave from the Court. It is, however, extremely unlikely that it was intended that the obtaining of that certificate would be sufficient to enable such a person to appeal to the Court of Appeal without any leave from the Court. Formerly the practice was that when a poor person wished to appeal to this Court as such an ex parte application was made to this Court for leave to appeal in forma pauperis, as is explained in the case of *Ex parte Goldberg* (1) and *In re Roberts*. (2) In the case of *Ex parte Goldberg*, Lord Esher M.R., said this (1): "As a general rule, the only jurisdiction of this Court is by way of appeal from a decision of some other Court; but as to the proceedings arising in an appeal, this Court has inherent jurisdiction as a Court to deal with them, for matters relating to an appeal to this Court are exclusively within its jurisdiction. Now the applicant is not asking for leave to sue, but to appeal in forma pauperis, and with that application this Court has an inherent jurisdiction to deal, and no other Court has." That general principle, which I think obtains, that this Court has an inherent jurisdiction to deal with such cases has, in my opinion, been given the force of regular enactment by the final words of r. 31 F, read together with r. 29, giving the power to discharge the certificate, in the phrase: "The provisions of the preceding rules shall mutatis mutandis apply to all proceedings in the Court of Appeal." So the substance

(1) [1893] 1 Q. B. 417.

(2) (1886) 33 Ch. D. 265.

of the matter is this, that where a person has not been a poor person in the Court below it is necessary that he shall do two things; first obtain a certificate as provided under the conditions which he has to satisfy already stated by my Lord, and, secondly, to obtain the leave of this Court.

Scrutton L.J. Does any one want to say anything about the next friend? The order for security is an order against both the plaintiff and the next friend. If either wants to go on with the appeal he will have to give security.

*N. K. Lindsay.* So long as it is clear that in the event of the security being forthcoming the plaintiff may go on with the appeal without the intervention of the next friend, that is all I should desire at the present moment.

*MacMillan.* In view of your Lordships' Order it is unnecessary to take up the time of the Court arguing the question of the order of Master Simner, and therefore I do not propose to go into the points of that order. The order for security is against whoever seeks to proceed with the appeal.

Scrutton L.J. As no one wants to argue the appeal from the Master's order it is struck out. The actual order is that the Court orders security in favour of each defendant to the extent of 100*l.* in spite of the certificate of the Poor Persons' Committee, and the Court under r. 29 of Order 16 discharges the certificate on the motion of the Court.

Solicitors for the defendant Bakewell: *W. A. Sando Parrott & Co.*

Solicitors for the defendant Salmon: *Thompson, Near & Co.*

Solicitors for the plaintiff Jack Rodriques and the next friend: *Bircham & Co.*

R. F. S.

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*March 1.*

## LYKIARDOPULO *v.* BUNGE Y BORN, LIMITADA.

*Shipping—Charterparty—Cargo of wheat, maize or rye—Option to ship other cargo at freight at rate for wheat, maize or rye—Basis of calculation of cost of discharge of optional cargo.*

The respondents, the charterers, chartered a ship to carry heavy grain, i.e., wheat, maize or rye. There was an option of shipping other lawful merchandise at the same rate as the heavy grain, the extra expenses of discharging the optional cargo to be paid by the charterers. At the port of discharge rye was rarely dealt with, and the cost of its discharge was higher than that of wheat or maize:—

*Held,* that in determining the cost of discharging the optional cargo the basis was the cost of discharging rye, and that the charterers were only liable to pay the shipowner, the appellant, the difference between the actual cost of the discharge of the optional cargo and that which would have been the cost of discharging rye.

SPECIAL CASE stated by an umpire.

By a charterparty dated January 9, 1932, the ss. *Panaghis*, of which the appellant N. D. Lykiardopulo was the owner, was chartered to Bunge y Born, Ltda., the respondents, to load a full and complete cargo of wheat and/or maize and/or rye at Bahia Blanca for delivery at a European port. The charterparty contained the following clause: Clause 6. "Charterers have the option of shipping other lawful merchandise . . . . in which case freight is to be paid on steamer's deadweight capacity for wheat in bags on this voyage at the rate above agreed on for heavy grain, but steamer not to earn more freight than she would if loaded with a full cargo of wheat in bags. This option can only be used if the quantity of other lawful merchandise as above shall amount to not less than 200 tons. All extra expenses in loading and discharging such merchandise over heavy grain to be paid by charterers."

The *Panaghis* loaded at Bahia Blanca 4478 metric tons of wheat, 2341 metric tons of oats, 704 metric tons of bran, and 124 metric tons of cottonseed and peanut cake. Either before or during the loading she was ordered direct to St. Nazaire, where she delivered the cargo. Wheat, maize and rye are heavy grain. The cost of discharging at St. Nazaire was at a uniform rate of 5 francs per maritime ton, but, according to the French maritime scale, the number of kilos to the maritime ton varied for different commodities. In the case of wheat and maize it was 1000 kilos, in the case of rye in bulk 850 kilos and rye in bags 800 kilos.

The shipowner claimed from the charterers 15,595 francs 81 centimes, representing the extra expense in discharging the cargo (other than the wheat) in fact carried, over and above the expense of discharging an equivalent weight tonnage of wheat or maize.

The charterers contended that under the charterparty they had the right to ship rye in bags, and therefore paid to the shipowner the equivalent of 11,215 francs 40 centimes, which represented the extra expenses in discharging the cargo (other than the wheat portion thereof) over the expenses of discharging an equivalent weight tonnage of rye in bags. The owner therefore claimed the difference between the 15,595 francs 81 centimes and the 11,215 francs 40 centimes paid to them—namely, 4380 francs 41 centimes.

The shipowner made certain submissions of fact and asked the umpire to make findings thereon. The umpire accordingly found (inter alia) facts as follows, though holding that none of them was relevant in deciding the question at issue: (*a*) that France does not ordinarily import rye from overseas, but that a few small shipments had been made; (*b*) that there was a poor and very limited market for overseas rye in France; (*c*) that the French maritime scale contained many other commodities besides grain.

The umpire awarded that the shipowner was not entitled to recover anything more from the charterers.

The shipowner appealed.

*Sir Robert Aske* for the shipowner. Clause 6 of the charterparty must be interpreted in a business sense, and "heavy grain" must mean such heavy grain as is handled at St. Nazaire. The case finds that rye is hardly handled at all at St. Nazaire, so that the cost of discharging rye there—which in fact is some 25 per cent. higher than that of discharging wheat or maize—is not the measure of the cost of discharging the optional cargo. That measure is the cost of discharging wheat or maize. No doubt a vessel loaded with rye can get discharged at St. Nazaire.

*H. U. Willink* for the charterers. The contract was one to pay the cost of discharging and not one to pay the expenses likely to be incurred at the particular port. The contract was one for the carriage of wheat, maize or rye, and under it the ship could have been ordered to load a cargo of rye and proceed to St. Nazaire to discharge, and the charterers ought not to be called on to pay more than they could have made the shipowner pay for the discharge of rye. The standard of comparison is not limited to wheat and maize. Rowlatt J. in dealing with this clause in *Hain Steamship Co., Ld.* v. *Louis Dreyfus & Co., Ld.* (1), said: "I think the clause simply means this: that the charterer is to relieve the ship of all the expenses of discharging incurred by the ship in excess of the expenses which the charterer could have caused the ship to have incurred by shipping heavy grain."

*Sir Robert Aske* replied.

ACTON J. In my opinion this award is correct. The point arising on the special case is upon clause 6 of the charter-party, which is as follows: "Charterers have the option of shipping other lawful merchandise"—specified merchandise being excluded—"in which case freight is to be paid on steamer's deadweight capacity for wheat in bags on this voyage at the rate above agreed on for heavy grain. . . . All extra expenses in . . . . discharging such merchandise over heavy grain to be paid by charterers." In the circumstances of this particular case the umpire was invited to attend to and to find certain facts which he accordingly has found in the special case, saying that although he has done so at the request of the owner he holds that these matters have no relevance in deciding the question in issue between the parties. I find myself entirely in accord with him. The clause in question has been construed by Rowlatt J. in *Hain Steamship Co., Ld.* v. *Louis Dreyfus & Co., Ld.* (1), who said: " In my judgment the arbitrator has come to a correct decision here, because I think the clause simply means this: that the charterer is to relieve the ship of all the expenses of discharging incurred by the ship in excess of the expenses which the charterer could have caused the ship to have incurred by shipping heavy grain." That construction was adopted by Roche J. in *Atlantic Shipping & Trading Co., Ld.* v. *Bunge y Born, Ld.* (2) The port to which this particular vessel was directed was the French port of St. Nazaire, and it appears that there is in fact very little import from overseas of rye into French ports and that in fact for a period of a considerable number of years no rye, so far as is known, has been imported from overseas into the port of St. Nazaire, and therefore substantially this is a port which does not deal with cargoes of rye shipped from overseas. It is said, therefore, that an implication arises and must be read into this contract that for the purpose of estimating extra expenses of discharge over the expenses of discharging heavy grain, which admittedly as a description includes rye as well as wheat and maize, regard must be had to what is the regular or habitual trade of the particular port to which the charterers direct the ship, or, at all events, if it be the fact that there is no trade whatever to the indicated port in one particular kind of heavy grain or there has not been any such trade for a considerable number of years, that particular kind of heavy grain is to be excluded from consideration by virtue of this implication. On the other hand, it is said that the ship was a ship which is prepared to carry cargoes consisting either wholly or in part of wheat or maize or rye, and accordingly under the contract is bound to discharge rye, if loaded, at any port within the prescribed limits which may be indicated by the charterers and to which they direct the vessel. The charterers, it is said, are then given the option of taking cargoes of different kinds of merchandise, that is to say, other than maize or wheat or rye, and,

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(1) (1930) 37 Ll. L. R. 101, 102.

(1) 37 Ll. L. R. 101, 102.

(2) (1931) 39 Ll. L. R. 292.

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accordingly, under the contract the ship is bound to discharge rye, if loaded, at any port within the prescribed limits which may be indicated by the charterers and to which they direct the vessel. The charterers, it is said, are then given the option of taking cargoes of different kinds of merchandise, that is to say, other than maize or wheat or rye, upon terms, the terms being that charterers have to pay any extra expenses incurred by shipment in excess of the primary obligation, which is an obligation to carry cargoes of heavy grain which in its terms includes rye as well as wheat and maize. Therefore, it is said, and to my mind quite correctly said, that having regard to the construction put upon this clause by Rowlatt J. in *Hain Steamship Co., Ld.* v. *Louis Dreyfus & Co., Ld.* (1), and adopted by Roche J. in *Atlantic Shipping & Trading Co., Ld.* v. *Bunge y Born, Ld.* (2), in order that the argument of Sir Robert Aske is to prevail, it would be necessary to read for the words in the sentence I have read, " could have caused the ship to have incurred by shipping heavy grain," the words " which it would be likely might have been caused to the ship by having to carry heavy grain to the particular port to which it happens that the vessel is directed." It is conceded, and indeed it appears in the special case, that the shipowner has received all the excess of expenses over and above what would have been the expenses of discharging rye at the port of St. Nazaire, and it is therefore said that the umpire was perfectly right in saying that he has received all that to which he is entitled. In my view, that opinion expressed by the umpire in the special case is quite correct. I think he was quite right also in saying that the facts to which his attention was drawn had no relevance in the construction of this contract; therefore the award must stand.

Solicitors for shipowner: *Holman, Fenwick & Willan.*

Solicitors for charterers: *Richards, Butler, Stokes & Woodham Smith.*

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(1) 37 Ll. L. R. 101, 102.

(2) 39 Ll. L. R. 292.

W. L. L. B.

# PARKFIELD TRUST, LIMITED *v.* CURTIS.

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*Jan.* 31.

[1933. P. 1732.]
[1933. P. 1959.]

*Moneylender—Memorandum of Loan—Rate of Interest—Obligation to state in Memorandum if rate of interest "calculated in accordance with the provisions of the First Schedule" to Moneylenders Act,* 1927*—Moneylenders Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6, *sub-ss.* 1 *and* 2 ; *Schedule.*

The Moneylenders Act, 1927, s. 6, sub-s. 1, provides : "No contract for the repayment by a borrower of money lent to him . . . . by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower . . . . in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower. . . . ."

Sub-s. 2 : "The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show . . . . either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act."

The plaintiffs, who were registered moneylenders, agreed to lend a borrower the sum of 500*l.* in consideration of the additional sum of 150*l.*, the whole sum of 650*l.* to be repaid by two instalments of 325*l.* each paid at the end of the first and second months. In the memorandum of the contract dated May 25, 1933, the loan was stated to be payable with interest at the rate of 240*l.* per cent. per annum and to be made upon the terms of a promissory note of the same date, a copy of which was attached. The promissory note contained a promise to pay 500*l.* together with interest at the rate of 240*l.* per cent. per annum "such sum of 500*l.* to be paid together with interest then due by consecutive monthly instalments of 325*l.* each" on June 25 and July 25, 1933 :—

*Held* (affirming Roche J.'s decision), that the rate of interest was incorrectly stated in the memorandum and therefore that the contract was unenforceable. Having regard to the form of the memorandum the rate of interest could not be treated as having been calculated in accordance with the provisions in the First Schedule to the Act, and in order that the instalments should include interest at 240*l.* per cent. per annum the second instalment must have been 330*l.* and not 325*l.*

Per Slesser and Romer L.JJ.: In a case where the rate of interest stated in the memorandum has been calculated in accordance with the provisions of the First Schedule to the Act, this fact must be stated in the memorandum in order to comply with s. 6 of the Act.

Appeal from Roche J.

The plaintiffs were registered moneylenders, and on May 25, 1933, the defendant obtained from them a loan of 500*l.*

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on his promissory note dated May 25, 1933, and a memorandum of the loan with a copy of the promissory note attached was signed by the defendant. The memorandum was in the following terms: " I the undersigned William Greenwood Curtis am willing to borrow from you on May 25, 1933, the sum of 500*l.* with interest at the rate of 240*l.* per cent. per annum and upon the terms of a promissory note to be as hereunder. . . . ." The promissory note was in the following terms: " I promise to pay to Parkfield Trust, Ld., or order . . . . the sum of 500*l.* this day advanced to me together with interest at the rate of 240*l.* per cent. per annum. Such sum of 500*l.* to be paid together with interest then due by consecutive monthly instalments of 325*l.* each commencing on the 25th day of June next and the sum of 325*l.* on the 25th day of July, 1933. In the event of default being made in the payment of any sum whether by way of instalment of principal or interest then, if Parkfield Trust, Ld., so elect, the whole balance of the principal then remaining due shall thenceforth become due and payable together with interest to date of such default. . . . ."

The defendant having failed to pay the first instalment of 325*l.* the plaintiffs commenced proceedings by specially endorsed writ dated July 17, 1933, to recover that instalment. Leave to defend in respect of that action was given on August 8, 1933. On the defendant failing to pay the second instalment also, the plaintiffs commenced proceedings by a specially endorsed writ dated August 15, 1933, to recover the sum of 375*l.* with interest on the sum of 700*l.* at the rate of 240*l.* per cent. per annum from July 25, 1933. On September 1, 1933, an order was made for consolidating the two actions and directing that the consolidated action should be entered in the short cause list.

At the hearing before Roche J. evidence was given by the chairman of the plaintiff company that he agreed to lend the defendant 500*l.* repayable with an additional 150*l.* by two monthly instalments of 325*l.* He had himself worked out the rate of interest and it came to 240*l.* per cent. per annum. For the defendant evidence was given by Albert Partridge, chartered accountant, that if interest was calculated in accordance

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with the First Schedule to the Moneylenders Act, 1927, it represented interest at 240*l.* per cent. per annum; but that if interest was payable at that rate it did not fit with the provision for payment "together with interest then due" by the two monthly instalments of 325*l.* On this footing the first instalment would as to 100*l.* represent interest on 225*l.* capital, and the remaining capital of 275*l.* with interest for a further month at 240*l.* per cent. per annum would amount to 330*l.* and not 325*l.*

Roche J. said that s. 6, sub-s. 2, of the Moneylenders Act, 1927, required that the memorandum of the loan should show "either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act." The latter alternative meant that when repayment of the loan was provided for in a manner that was not in terms expressed as payment of so much capital and so much interest, information must be noted in the memorandum of the rate of interest being charged calculated in accordance with the First Schedule to the Act.

Here the objection taken was that the moneylender had adopted both alternatives under the sub-section and mixed them together. He found as a fact that the bargain was for a loan of 500*l.* which was to cost the borrower 150*l.*, the whole to be repayable by two monthly instalments of 325*l.* The chairman of the plaintiff company had stated in evidence that he then calculated the rate of interest and put it in the note; but he had put in the wrong amount. If the terms of the contract were followed out and there was paid off at the end of the first month an instalment of capital with the interest then due, that interest calculated at the rate of 240*l.* per cent. per annum must be 100*l.*, with the result that the next instalment would only include the capital remaining due and interest at a lower rate. It was argued that there was no reason why 100*l.* out of the first instalment should be allocated to interest, but not to do so would be inconsistent with the terms of the contract itself. In these circumstances the requirement of s. 6, sub-s. 2, of the Act that the memorandum must contain all terms of the contract correctly expressed had not been complied with, and the result was that the contract was unenforceable.

The plaintiff company appealed. The appeal was heard on January 31, 1934.

*Neville Laski K.C.* and *R. F. Levy* for the appellants. The rate of interest was correctly stated in the memorandum having regard to the terms of s. 6, sub-s. 2, of the Act of 1927. Roche J. has found that the bargain was that the appellants would lend the respondent 500*l.* on being paid 150*l.*, the total sum of 650*l.* to be repaid by two monthly instalments of 325*l.* each. That being so the rate of interest must, under s. 6, sub-s. 2, be calculated as provided in the First Schedule to the Act, and when so calculated 240*l.* per cent. per annum is found to be correct. It is the original oral agreement which has to be expressed in the memorandum, and when the agreement is to pay a lump sum the First Schedule must be resorted to to ascertain the rate of interest.

[LORD HANWORTH M.R. The sub-section provides two alternatives in regard to stating the rate of interest. This appears to be a case where the first alternative was resorted to so that the First Schedule never becomes applicable.]

Having regard to the nature of the bargain, the rate of interest could only be ascertained by the use of the First Schedule. It is said that the rate of 240*l.* per cent. per annum does not accord with the provision for payment by instalments, and this is true if the first instalment is to be treated as containing 100*l.*, being all the interest due down to that date. That accords with the view taken in *Abrahams* v. *Dimmock* (1); but under the Act of 1927 the first payment should be treated as 250*l.* capital and 75*l.* interest: see s. 15, sub-s. 2. In any case the calculation of the rate of interest has been made in accordance with the Act.

*H. J. Wallington* for the respondent was not called upon.

(1) [1915] 1 K. B. 662, 673.

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LORD HANWORTH M.R. This appeal fails. What the Court has to determine is whether this action brought to recover the two instalments of 325*l.* payable under the promissory note which followed on the memorandum of the terms of the loan dated May 25, 1933, is entitled to succeed.

The sum of 500*l.* was borrowed by the defendant Curtis on May 25, 1933, and we are told that the parties orally agreed to the loan and that in order to comply with the Moneylenders Act the terms were embodied in the memorandum to which the promissory note was attached. That promissory note provided that a sum of 325*l.* should be repaid on June 25, 1933, and a further sum of 325*l.* on July 25, 1933, and also that if the first instalment was not paid on the due date then at the election of the lender the full amount of the two instalments should be recoverable. As a matter of fact default was made in respect of the first sum of 325*l.* and thereupon a writ was issued to recover that amount. Default was also made on July 25, 1933, in regard to the second instalment, and a writ was issued to recover payment of that sum. On August 8, 1933, an order was made in the first action giving the defendant leave to defend in respect of the whole amount claimed, and in September, 1933, an order was made for the consolidation of the two actions. The case then came before Roche J., who gave judgment for the defendant having regard to the terms of the memorandum and to the Moneylenders Act, 1927. From that decision the present appeal is brought to this Court.

The Moneylenders Act is a very stringent Act, and it invades the freedom of contract between lenders and borrowers and prevents such a contract from being made otherwise than in certain terms. The part of the Act of 1927 with which we are concerned in this case deals with the form of contract and the terms to be introduced in it, while the earlier part of the Act deals with the registration of moneylenders and restrictions on moneylending advertisements. It is s. 6 and the following sections that deal with the matters essential to contracts made by moneylenders, and it is plain that their object is to ensure that there should be material available to enable the Court, if the contract comes before it, to presume under s. 10 in a

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proper case that the interest is excessive because it exceeds 48 per cent. per annum. Thus it is plainly indicated that importance is attached to the actual rate of interest charged, which ought to be plain to the borrower and to the Court for the purpose of enabling the provisions in s. 10 to be applied. Sect. 6, sub-s. 2, provides: "The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act."

The system adopted in this case was one under which a lump sum was added to the loan and the total sum made repayable in instalments at certain intervals. It may be very difficult in these circumstances for the borrower to know the true nature of the terms of the bargain and the rate of interest which he is being charged, though some assistance is given by s. 12, which prohibits an agreement by the borrower to pay any sum on account of costs, charges, or expenses incidental to the negotiation for and granting of the loan.

Now under s. 6, sub-s. 2, there is an alternative provided in regard to the statement of the rate of interest—namely, either to put down the interest charged on the loan expressed as a rate per cent. per annum or to discover the rate of interest, if necessary, because it is not otherwise made plain, by the use of the provisions in the First Schedule to the Act. Whichever road is followed the end is the same. It is to arrive at the rate of interest being charged for the loan. It is to my mind plain that this part of s. 6, sub-s. 2, furnishes two alternative methods, and in my opinion there is no room for a resort to the mode of calculation stated in the First Schedule in a case where there is a clear statement of the rate of interest being charged to the borrower. Sect. 15, sub-s. 2, bears out this view, for it says: "Where by a contract for the loan of money by a moneylender the interest charged on the loan is not expressed in terms of a rate, any amount paid or payable to the moneylender under the contract . . . . shall be appropriated to principal and interest in the proportion that the principal bears to the total amount of the interest, and the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act shall be deemed to be the rate of interest charged on the loan."

I turn with these plain indications in mind to the terms of the promissory note. It is a promise to pay the loan of 500*l*. made on May 25, 1933, with interest at the rate of 240*l*. per cent. per annum. That is so plain and simple a statement of the rate of interest that it eliminates any resort to the alternative provision in s. 6, sub-s. 2, which is only needed when no rate of interest is stated, so that it is necessary to go through the method laid down in the Schedule to arrive at the rate of interest. Then the promissory note provides : " Such sum of 500*l*. to be paid together with the interest then due by consecutive monthly instalments of 325*l*. each, commencing on the 25th day of June next and the sum of 325*l*. on the 25th day of July, 1933." And the sanction to enforce that contract is stated to be that on default being made in the payment of any instalment then, if the moneylender elects, the whole amount remaining due becomes immediately payable.

It seems to me impossible on the terms of that document for the borrower to say that he is entitled to pay less than the loan made to him with interest at the rate of 240*l*. per cent. per annum, and yet payment of the two instalments of 325*l*. is less than the amount of the loan with interest at 240*l*. per cent. per annum over the period of two months. The answer then to any attempt to pay by equal instalments of 325*l*. would be that the borrower had made a contract to repay the loan of 500*l*. with interest at 240*l*. per cent. per annum. When it is remembered that the contract says that each instalment is to include the interest then due, it becomes plain that the interest contained in the two payments of 325*l*. is less than interest at the full rate of 240*l*. per cent. per annum ; for out of the payment of 325*l*. at the end of the first month 100*l*. must be attributed to interest then due and 225*l*. to capital, leaving 275*l*. out of the original loan still owing, which with interest at 240*l*. per cent. per annum for another month requires a final payment of 330*l*. and not 325*l*.

That being so, I turn back to the provision in s. 6, sub-s. 2, of the Act that the note or memorandum shall show " either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act." We are asked to amalgamate those alternative provisions and by some such method to arrive at the view that 240*l*. per cent. per annum is really the rate of interest. That is in my view impossible. As I have pointed out already, the Act is intended to be exacting, and this compels us to read s. 6, sub-s. 2, precisely as it stands. When we do that it is clear that the memorandum with the promissory note attached does not contain what is required, with the result that the contract cannot be enforced.

I would add that if the computation of the rate per cent. of interest be made under the First Schedule, then I think that the note or memorandum, after stating the amount of the instalments to be paid, should explain that they included interest at whatever rate of interest per annum was ascertained from the First Schedule to the Act, and that this rate of interest has been found under that Schedule.

In the circumstances I have come to the conclusion that Roche J. was right and that his decision should be affirmed and the appeal dismissed with costs.

SLESSER L.J. I agree that the appeal should be dismissed for the reasons stated by the Master of the Rolls ; and I propose to confine what I say to the consideration of s. 6, sub-s. 2, of the Moneylenders Act, 1927. Sect. 6, sub-s. 2, provides that: " The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum, represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act." The sub-section therefore contemplates two methods whereby the amount to be repaid in addition to the sum actually advanced can be shown as a rate of interest. The first alternative deals with interest on loans which can be readily expressed as a rate per cent. per annum, and then the sub-section goes on to deal with something which is not in terms expressed as interest, and in that case the rate per cent. per annum has to be calculated in the manner provided in the First Schedule to the Act. In other words, there may be either a true rate of interest or a notional rate per cent. per annum arrived at under the Schedule.

In these circumstances I do not think that the requirements of the section are fully complied with unless it is in the note or memorandum stated in terms whether the rate of interest therein mentioned is a true rate of interest or a rate per cent. per annum calculated in manner provided in the Schedule. The object of the sub-section is to provide for the borrower and the Court a true note of the transaction, and to my mind it is not stating the true terms of the contract and so complying with the requirements of the sub-section to speak of a rate of interest simpliciter when the rate stated is not part of the agreement between the parties but only a rate which has been ascertained by reference to the schedule.

I mention this because in the present case the rate of interest has been stated simpliciter, although the contract was for repayment of the loan with a lump sum added to it in instalments. On that ground alone, in addition to that stated by my Lord, I am of opinion that the memorandum in this case is defective seeing that it does not state, as is the case, that the rate of interest was purported to be arrived at under the First Schedule and not by direct agreement between the parties.

ROMER L.J. I agree with the judgments that have just been delivered. Unfortunately for the plaintiffs in this case they have mixed up the two methods contemplated

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Parkfield Trust, Ld. v. Curtis.

Romer L.J.

by s. 6, sub-s. 2, for arriving at the rate per cent. per annum of the interest charged. The confusion which may result from so doing has been well illustrated in this case. By the memorandum it is stated that the plaintiffs made to the defendant on May 25, 1933, a loan of 500*l.* repayable with interest at the rate of 240*l.* per cent. per annum. In the promissory note attached to the memorandum the loan is made repayable by two instalments of 325*l.* payable at the end of the first and second months after the date of the loan. Now, applying the rate of interest previously stated, the sum of 325*l.* to be paid when June 25, 1933, arrived must include 100*l.* interest and therefore only 225*l.* capital, leaving 275*l.* out of the capital still to be paid, which with interest at the same rate for another month would amount to 330*l.* It follows that the instalments of 325*l.* are not sufficient to include interest at the rate of 240*l.* per cent. per annum. If, on the other hand, s. 15, sub-s. 2, of the Act is applied and the first instalment of 325*l.* is treated as being made up of 250*l.* capital and 75*l.* interest, the interest for that month would have been paid at the rate of 180*l.* per cent. per annum only. How in such circumstances is the unfortunate borrower to find out how much principal and interest remains owing. ?

Solicitors : *Philip Goodenday & Co.* ; *W. H. Speed & Co.*

H. C. G.

## RUGBY SCHOOL (GOVERNORS) *v.* TANNAHILL.

1934
*April* 10.

[1934. R. No. 353.]

*Landlord and Tenant—Lease—Forfeiture—Breach of Covenant not to use premises for illegal or immoral purposes—Notice to quit—Negative Covenant—Breach incapable of remedy—Omission to require breach to be remedied—Omission to require compensation in money—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 146, *sub-s.* 1 (*b*) (*c*).

The defendant lessee committed a breach of her covenant not to use the premises for illegal or immoral purposes. Notice to quit served on her in consequence did not require her to remedy the breach nor to make compensation in money under s. 146, sub-s. 1 (*b*) (*c*), of the Law of Property Act, 1925:—

*Held,* (1.) that the breach was not remedied by ceasing to commit the breach; (2.) that the breach was not capable of remedy, and that, consequently, the omission in the notice to require it to be remedied did not invalidate the notice; and (3.) that the notice was not invalidated by the omission to require payment of compensation in money although the breach was incapable of remedy, because if the landlords did not require compensation they need not ask for it.

Action tried by MacKinnon J. under Order xiv., r. 8 (*b*).

The plaintiffs, the Governing Body of Rugby School, were the owners of certain premises, 14 Great Ormond Street, in the county of London. By a lease dated November 11, 1931, they let the said premises to one Arthur Reason from June 24, 1932, to June 24, 1939, at a rent of 110*l.* per annum. Under a licence from the plaintiffs dated November 28, 1932, Reason assigned the said lease to the defendant, Marian Hannah Cecilia Tannahill. The lease contained a covenant by the lessee and his assigns not to permit the premises to be used for any illegal or immoral purpose. By the lease, s. 196 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), was made applicable to all notices. On January 13, 1934, the defendant was convicted of permitting the said premises to be used for habitual prostitution contrary to s. 13 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), and was fined 10*l.* and ordered to pay fifteen guineas costs. By a notice dated January 25, 1934, addressed to the defendant, the plaintiffs' solicitors gave the following notice to the defendant: "We hereby give you notice, pursuant to section 146 of the Law of Property Act, 1925, that you have broken the covenant contained in the said lease not to permit the said premises to be used for any illegal or immoral purpose in that you have knowingly permitted the said premises or part thereof to be used for the purposes of habitual prostitution. And in the exercise of the right of re-entry conferred upon them by the said lease for (amongst other things) a breach of the said covenant, we hereby on behalf of your said landlords require you to quit and deliver up the said premises." Since the date of the said conviction the defendant had not used the premises for any immoral or illegal purpose, and had evicted all her sub-tenants complained of, and all her present tenants were of unimpeachable character. She stated in her affidavit in opposition to summary judgment that she was prepared to undertake to the Court that she would in the future take every care in the choice of her tenants. She stated that she had paid 850*l*. on the assignment to her of the said lease, of which 500*l*. was agreed as the value of the lease.

By the Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 146, sub-s. 1: "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—(*a*) specifying the particular breach complained of; and (*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach; and (*c*) in any case, requiring the lessee to make compensation in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

It was contended by the defendant that the notice to quit was bad in that it did not require the defendant to remedy the breach under sub-s. 1 (*b*) above set out, and also in that it did not require the defendant to make compensation in money under sub-s. 1 (*c*).

*H. I. P. Hallett* for the plaintiffs. The plaintiffs were not bound to ask for compensation if they did not want it—per Lord Esher in *Lock* v. *Pearce* (1)—even though, as will be contended, this breach was incapable of remedy. The premises had been used for the purposes of prostitution, and the plaintiffs in their position did not deem it consistent with their dignity to require compensation, although they had not required the breach to be remedied. Russell J. followed *Lock* v. *Pearce* (1) in *Civil Service Co-operative Society* v. *McGrigor's Trustee.* (2) In *Lock* v. *Pearce* (1) a notice very similar to that in the present case was held to be good.

With regard to the omission to require the breach to be remedied, it is contended for the defendant that the breach is capable of remedy and that the remedy consists in ceasing to commit the breach, and, it is added, the breach has in fact been remedied, so that the house is now respectably conducted. But this is not a remedy, for it would give the landlords no security against a repetition of the breach. If the defendant is right the landlords' right of action would cease as soon as that remedy was applied, and if they had already commenced an action it would have to be dismissed with costs. If a similar breach was again committed the landlords would have to serve a fresh notice and all the proceedings would be repeated, with the same result, and so ad infinitum. All the cases in which it has been held that the absence of a requirement to remedy the breach invalidates the notice are cases of the breach of an affirmative covenant to do something, e.g., to build or repair. The covenant in the present case is a negative covenant.

It is within the unfettered discretion of the Court to decide whether or not relief from forfeiture should be granted; but it is submitted that this is not a proper case for the exercise of that discretion in the defendant's favour.

*Fearnley-Whittingstall* for the defendant. This breach was one capable of remedy—namely, by ceasing to commit it, therefore the notice, which did not require it to be remedied, was bad. The fact that after remedying the breach the defendant could commit the same breach again is no answer. This breach is as capable of remedy as any other; it is not as if it was a covenant not to be convicted. If the covenant had been one, e.g., not to use the premises as a school, a breach thereof by so using them could be remedied by ceasing so to use them. There can be no difference in principle between that case and the present one, the only difference in fact being that the present breach involves the commission of a criminal offence and the affixing a stigma on the premises. All that *Lock* v. *Pearce* (1) decided was that where the breach was capable of remedy the landlord need not demand compensation, and is no authority for saying that where the breach is not capable of remedy, as is here contended for the plaintiffs, the notice need not ask for compensation. The words in s. 146, sub-s. 1 (*c*), "in any case" include the case where the breach is not capable of remedy.

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(1) [1893] 2 Ch. 271, 276.

(2) [1923] 2 Ch. 347, 357.

With regard to relief. Under s. 5, sub.-s. 1, of the Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20), on conviction of keeping premises as a brothel, the landlord may require the lessee to assign the lease to some one approved by the landlord. Although that sub-section does not, for some reason, apply to the particular offence of which the defendant was convicted, the latter is not a more serious offence than that of keeping a brothel. So that the plaintiffs are claiming a greater penalty than that provided by the statute. It is submitted that the penalty of forfeiture should not be inflicted.

*H. I. P. Hallett* in reply referred to *Rose* v. *Spicer* (2) and Foà's Landlord and Tenant, 6th ed., p. 723.

MACKINNON J. [Having stated the facts as above, continued:] In her affidavit the defendant said: "I admit the facts set out in paras. 1 to 6 of the affidavit of Gerald Herbert Leslie Sweet" (the plaintiffs' solicitor). Para. 4 of the latter affidavit states that the deponent was informed by the police officer in charge of the case that on December 20, 1933, the defendant was arrested and charged and convicted of knowingly permitting the premises in question to be used for the purposes of habitual prostitution. By para. 5: "I am further informed by the said officer that the evidence upon which the defendant was so convicted was to the effect that in consequence of complaints made to the police special observation had been kept on the said premises on December 8, 9, 11, 12, 13 and 14, 1933, that during that period seven women known to the police as prostitutes were seen to accompany sixty-four different men to the house; that the defendant was seen to admit some of the couples, that she was also seen about the door of the premises when couples entered and left and also in the company of prostitutes in a near-by public-house, and that four of the known women who took men to the premises resided on the premises. I am further informed by the said officer that the magistrate on convicting the defendant remarked that the premises were very extensively used and the defendant must have known perfectly well what was going on and in fact it would have been impossible for her not to know."

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(1) [1893] 2 Ch. 271.

(2) [1911] 2 K. B. 234, 241.

These are the circumstances under which this action is brought. The plaintiffs' claim is resisted and it is said that I ought to dismiss it, because the notice to quit was a bad notice in that in two respects it did not comply with s. 146, sub-s. 1, of the Law of Property Act, 1925, which is as follows [his Lordship read it]. It is said that this was a breach which was capable of remedy, and that the notice is bad because it did not require the defendant to remedy this breach. The second ground is that the notice was bad because it did not require the defendant to make compensation for the breach in money.

The decision of the second ground is an easy one. It was decided by the Court of Appeal under s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881 (which was repealed by s. 207 and Sch. VII. to the Act of 1925, and reproduced in s. 146, sub-s. 1, of the latter Act), in the case of *Lock* v. *Pearce* (1), that where the breach was one of the covenant to repair, the notice was good although it did not require the lessee to make compensation in money, the reason being that the lessor did not desire compensation. Lord Esher in that case said (1): "It is impossible to suppose, or to hold, that he must ask for compensation in money as well as for the breach to be remedied. It is not compensation for the expenses of doing the repairs; it must be for something more than that." He adds later: "Therefore it seems to me that the meaning of the section is that the breach must be remedied if it can be, and there must be compensation besides that, if there is anything for which to compensate. I go further, and say that the lessor need not, if he does not want any compensation, ask for it." The reasoning in that case was followed and applied by Russell J., as he then was, in *Civil Service Co-operative Society* v. *McGrigor's Trustee* (2), which differed from the former case in that the breach, namely the bankruptcy of the lessees, was not capable of remedy. He said (3) "I confess that, unassisted by authority, the wording of the section [s. 14, sub-s. 1, of the Conveyancing Act, 1881] causes me trouble. The words 'in any case' appear to me to mean 'whether the breach is capable of remedy or not;' and the section would seem to call for a notice which requires the lessee to make compensation for the breach both where the breach is capable of remedy, and where it is incapable of remedy. However, the Court of Appeal has held, in general terms, that if the landlord does not desire compensation he need not require it, and that the absence of a requirement for compensation does not invalidate a notice under sub-s. 1: see *Lock* v. *Pearce.* (1) I am content to follow the views there expressed." I am similarly content in the present case.

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(1) [1893] 2 Ch. 271.

The second point has given me rather more difficulty—namely, the contention that the notice was bad because it did not require the lessee to remedy the breach. It is stated that, notwithstanding the absence of a requirement to remedy, the lessee has in fact altered her conduct, and the house is now respectably conducted. Mr. Fearnley-Whittingstall for the defendant says that breach of a negative covenant can be remedied by compliance therewith as from a certain day, and instances the breach of a covenant not to use the premises for a children's school, which he says can be remedied by ceasing so to use them. At first sight this is an attractive argument, but it has a very obvious disadvantage from the point of view of the landlord, for, supposing the case of a breach of a covenant not to do something and, when the landlord complained, an immediate abstention from the user of the premises in breach of the covenant, the landlord would be deprived of any cause of action, or, if he had already begun one, he would have it dismissed with costs. And that might happen again and again; the landlord would have to give a fresh notice in each case, with the same result. On the other hand it is quite clear that if the covenant is an affirmative covenant to do something, e.g., to repair or to build, then if the repairs are done or the buildings erected within a reasonable time there is no possible danger of a renewal of the breach. I think there is a radical distinction between the two sorts of covenant. A promise to do a thing, if broken, can be remedied by the thing being done. But breach of a promise not to do a thing cannot in any true sense be remedied; that which was done cannot be undone. There cannot truly be a remedy; there can only be abstention, perhaps accompanied with apology. I think the breach of a negative covenant of this sort is not one "capable of remedy" within the section. This does not mean that the penalty for breach of a negative covenant is necessarily greater than that for breach of an affirmative covenant. For the power of the Court to grant relief remains, and it is in regard to the exercise of that power that abstention by the lessee from further breach, and perhaps his penitence, are or may be relevant. But if the argument for the defendant is correct, the question of relief would not arise, for no forfeiture would have been incurred, and the cause of action would have disappeared as soon as the defendant ceased to conduct the premises in the way complained of. Therefore as a result of the particular nature of the covenant in question, I hold that this breach was not one capable of remedy, and consequently that the notice which did not require the breach to be remedied was not a bad notice. There must be judgment for the plaintiffs for possession. Having regard to all the circumstances, I do not think I ought to grant relief.

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(1) [1893] 2 Ch. 276.

(2) [1923] 2 Ch. 347.

(3) Ibid. 356.

Solicitors for plaintiffs: *Iliffe, Sweet & Co.*
Solicitors for defendant: *Solomon, Staddon & Barnes.*

W. L. L. B.

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